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THE RAILROAD CONSPIRACY TRIAL.[1]

WITHIN the last few years the number of protracted trials has greatly increased. Not only in criminal matters have complicated cases arisen, in which the masses of evidence necessary for the explanation and just understanding of the facts, have absorbed days and weeks of diligent labor, but civil suits have also consumed an equal or greater length of time. Each member of the profession will recall cases of this nature in his own immediate neighborhood. Murder cases, cases of land rights or water rights, patent cases, whether telegraph or India rubber, equally elastic and extended, illustrate the remark. Nor is the evil confined to our own country. The trial of the Count Bocarmé and his wife last spring in Belgium, for poisoning a brother-in-law, lasted nearly three weeks, and more recently the hearing in the case of Mr. Ramshay, Judge of the County Court in Liverpool, occupied eighteen days; and the counsel (on both sides) were four days in delivering themselves to the Court. But of whatever length or dimensions, they shrink to insignificance when compared with the Railroad Conspiracy Trial which has been recently completed in Michigan. The annals of criminal jurisprudence hardly furnish

[1] Report of the great Conspiracy Case. — *The People of the State of Michigan* v. *Abel F. Fitch et al.*, commonly called the railroad conspirators; tried before His Honor Warren Wing, Presiding Judge of the Circuit Court for the County of Wayne, at the May term, 1851, in the city of Detroit. Containing the evidence, arguments of counsel, charge of the Court, and verdict of the jury. One volume. pp. 868. Published by the Advertiser and Free Press. Detroit, 1851.

a parallel to it in any respect, either in the enormity or novelty of the crime charged, the number of the defendants, the length of the trial, or the variety of incidents occurring while it dragged its slow length along. And while it now thus stands alone, we hope, for the credit of disgraced humanity, that it may ever stand forth solitary and alone, and that the stern duty of the public prosecutor may never again be required to place before a jury evidence of such fiendish crimes.

We hardly know how best to describe the extent and magnitude of the trial. To say that the jury were impannelled on the twenty-eighth of May, and that the verdict was rendered on the twenty-fifth of September; and that during the intermediate time, except two adjournments of a week each, and several adjournments from day to day in consequence of the sickness of some of the defendants or of some of the jurors, the Court were busily employed early and late, morning and afternoon, in this trial, not unfrequently hearing arguments upon points of law or intervening motions during the adjournments; that the arguments alone of counsel occupied seventeen days; that fifty defendants were named in the indictment, and nearly forty were put upon their trial; that they were brought seventy miles from their friends and from the body of the county of their residence, for trial to the city of Detroit, whose continuing prosperity was closely identified with that of the corporation against which the defendants were accused of conspiring — a corporation which, rescued from the languishing condition of a State work, had, by the energies of private capital, sprung into a vigorous life, and, at an expenditure of eight millions of dollars, had spanned the peninsula and connected the waters of the lakes that form its eastern and western boundary; — that in default of bail, the defendants were closely confined within the walls of the jail, which they exchanged, as the days of the trial wore tediously away, only for the staring gaze of the curious or hostile crowd, when they filled the dock with their dense array; that among them were the chief members of their community — the physician, the lawyer, and the man of substance and of learning; that the alleged chief instigator and supporter, and prime mover of the conspiracy, with one of his alleged accomplices, "a vagrant boy," sickened and died during the trial; that two hundred and forty-six witnesses were examined for the prosecution,

and two hundred and forty-nine for the defence; that the taking the testimony of this army of four hundred and ninety-five witnesses alone occupied sixty-six days; that ten attorneys assisted in conducting the prosecution, and a nearly equal number, — chief among, and overtopping whom, was the distinguished senator, the learned lawyer, and the able and experienced advocate from New York, — managed the defence; to say this would give some idea, though an inadequate one, of the importance of the trial, and of the magnitude of the interests involved in it.

The indictment against the defendants, found at the April term of the Wayne County Court, contained four counts. The first count charged the defendants, including one Gay, with wilfully and maliciously burning the depot of the Michigan Central Railroad Company, at Detroit, on the night of the 11th of November, 1850; the second, charged Gay with the same offence; the third, charged the defendants, except Gay, as being accessories before the fact; and the fourth, charged them as accessories after the fact. The first and fourth counts were abandoned by the prosecution, and the trial was had upon the second and third. After the arraignment and plea of Gay and the other defendants, but before the commencement of the trial, Gay, the principal, died. The prosecution was, however, allowed to proceed against those charged as accessories, under the statute of Michigan, which provides, "That the accessory may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not be amenable to justice." Thirty-seven of the defendants were in Court and upon trial. The others, except Gay, who had died, had either not been arrested, or, if arrested, had been discharged.

After the impannelling of the jury, a motion was made by the counsel for the defendants for separate trials, but it was subsequently agreed that all the defendants should be tried together. Under another part of the same agreement the case was opened by the government, and testimony introduced to prove the *corpus delicti*, the burning of the depot at Detroit, and then adjourned for a week, to await the coming of the Hon. William H. Seward, who had been engaged as counsel for the defence. Upon his arrival within the week, the case proceeded. The government introduced evidence to show that the depot at Detroit was burned at the time alleged in the indictment; that it was

set on fire by Gay, at the instigation and procurement of the defendants; that by stratagem Gay had been induced to confess, repeatedly, the fact that he set the depot on fire; that he was employed thereto by some of the defendants, and was paid by them one hundred and fifty dollars therefor; that he received the ingeniously contrived match, with which he said he fired the depot, from them; and that he, by the procurement of the defendants, was still engaged in other projects of burning other depots belonging to the railroad, and had attempted to burn them. Evidence was also introduced to show that, during the years 1849 and 1850, wanton outrages were committed upon the property of the road in the vicinity of Leoni and of the residence of most of the defendants; that these outrages were confined to that vicinity; that the cars of the night trains were frequently stoned; that they had been fired at with fire-arms; that obstructions of various kinds were placed upon the track; that the cars were thrown from the track; that switches were displaced, rails torn up, culverts destroyed, wood-piles burned, and generally, that every device was resorted to by the defendants to injure the property and business of the road by making the passage over it notoriously unsafe; that some of these acts were committed by several of the defendants jointly; that all of the defendants participated in them more or less; that the defendants were in the habit of meeting daily in larger or smaller numbers; that at these meetings the whole conversation was upon and against the road; that frequent threats were made, and when the road met with any loss from their acts, joy was expressed, and the hope that this would bring the road to terms; that the meetings were held generally at the tavern of one Filley, who was connected with Fitch, who was called captain; that when any stranger was present, or any one whom they suspected was a spy, the conversation was changed — as one of the witnesses expressed it, "he could not even *whittle* up to them;" that all the acts were done in pursuance of a conspiracy, or common design, to which all the defendants were privy; that this conspiracy embraced the burning of the depots of the company, and particularly the one at Detroit; that the project of clearing any of their number when charged with injuring the road, by falsely swearing to an *alibi* or to any thing else, was included in the designs of the conspirators; and that the motive and object of

these acts on the part of the defendants were to bring the road to terms, and to oblige it to pay for the cattle killed by the cars. There was no evidence that all of the defendants were present at any one meeting; nor that any concerted or appointed meeting was held at which formal votes were taken, or informal agreements made, to do any of the overt acts complained of.

There was no difficulty in showing the outrages upon the road and its property. Passengers, engineers, brakemen, and employees of the road, testified to the obstructions upon the tracks, the stoning and firing at the cars, the displacement of the switches, the burning of depots, culverts and wood-piles, the danger of travelling over that section of the road, and that nowhere else on the line of the road was any trouble met or apprehended. To prove the complicity of the defendants in these acts, and more especially in the crime charged in the indictment, was a more difficult task. The inhabitants in that vicinity were hostile, and would make no disclosures. The outrages were committed generally upon the night trains. The increasing depredations upon the road, and the diminished travel in consequence of this feeling of insecurity, made some effort on the part of the corporation necessary. They, therefore, in the fall of 1850, and the winter of 1851, employed agents to visit this portion of the road, and to find out those concerned in the outrages. Some of those agents, acting ostensibly as purchasers of wheat, succeeded in gaining the confidence of the defendants, and were permitted to hear their plans and conversation. To them confessions were made of the previous outrages, of general hostility, and of a determination to force the road to come to terms. The employment of such agents, however, soon became known to the defendants; all strangers were looked upon with suspicion as spies and informers, and those who had gained their confidence, and were suspected, were threatened with death if they made disclosures. A portion of the evidence, both of the confessions and of the overt acts of some of the defendants, came from those who had been employed upon their farms, some of whom had participated in the outrages.

The chief witness for the prosecution to connect the defendants with the crime charged in the indictment, and to prove that the alleged conspiracy included the burning of the depot at Detroit, was Phelps, who, in 1844, had been

convicted of horse-stealing, and sentenced to the State Prison for five years, whence he was pardoned six months before the expiration of his sentence. It was he, who, while employed by the road for that purpose, gained the confidence of Gay, who, formerly a convict, was then leading an utterly disreputable life at Detroit, obtained from him the confessions above given, and laid plans with him for future operations against the road and its property. He visited Fitch, Filley, and other of the defendants, was told by them that they had employed Gay to burn the depot at Detroit. He testified that he was employed by the defendants to burn the depot at Niles; that he received from them a match, said by the defendants to be similar to the one used to fire the depot at Detroit, and with it attempted to burn the depot at Niles; but that, as he had informed the agents of the Company of his intention, the fire was at once extinguished. He, as well as the other persons employed by the road, made frequent reports to the superintendent, which were at once reduced to writing. Two respectable citizens, one of them one of the attorneys for the prosecution, whose characters were above suspicion, were introduced to Gay by Phelps as accomplices in crime, and to them Gay repeated the story that Phelps had previously told his employers. The testimony of Phelps was corroborated to some extent by that of Lake, who had been in the State Prison for helping a friend to escape from jail, but whom the defence did not attempt to impeach; and also, by that of Westcott, who, unlike his fellow-witnesses, had not been in prison, but had been indicted at some County Court for perjury, and had been discharged, as the complainant died before the indictment was tried. The defence made no attempt to impeach him. This was the case on the part of the Government.

The main defence was threefold. 1st. That the *corpus delicti* was not proved. They took the ground that the burning was accidental, and introduced evidence from which the jury could infer that the fire might have originated from the machinery used in hoisting and delivering wheat, or from candles which, without sufficient guards, had been used in the building that night. But the weight of evidence as to the cause of the fire, apart from the confession of Gay, showed that it was the work of an incendiary. 2d. That no conspiracy among the defendants, as alleged, was proved or existed, and that the several overt

acts against the road and its property, were single unconnected acts, done by one or two persons; that the different acts were done by different persons, and were done without concert. 3d. That the pretended complicity of the defendants, or of any of them, with Gay, in the burning of the depot at Detroit, was the result of a conspiracy between Phelps, Westcott, and Lake, the motive thereto being the animosity and vindictive hatred which Phelps was alleged to bear against Fitch, as the supposed cause of his having been sent to prison, and also their hope of obtaining the reward offered by the corporation, for the discovery and conviction of the authors of the depredations upon their property. An *alibi* was set up for some of the defendants in some of the transactions, but this was relied upon rather to contradict the government witnesses, than as a substantive matter of defence. The two main points of the defence were, the absence of proof of any conspiracy among the defendants, and the conspiracy on the part of Phelps and others against them. Connected with these points, however, and towards which their energies were chiefly directed, was the attempt to impeach Phelps. Of this we shall speak further hereafter.

The counter-conspiracy against the defendants was sought to be sustained mainly for these reasons. 1st. Because the manner in which the crime was confessed to have been committed was impossible — such a match as described by the government witnesses not being able to burn — and the impossibility of the thing proving the fabrication of the story. To sustain this point, the defence introduced five or six witnesses who had made experiments upon a match prepared, as they said, according to the description given by the government witnesses. To rebut this, the prosecution put on the stand a chemist, to show that a match prepared according to the actual description by the government witnesses would burn, as he had proved by experiment.

2d. Because the matches produced by the prosecution were fraudulently fabricated by Phelps and Lake, the witnesses for the government, and were by them fraudulently placed where it was pretended they were found. Reliance was had here, on the fact that no matches nor materials or implements for making them were found in the possession of the defendants, nor any traces of their manufacture; but that Phelps and Lake had tools, and Lake was once seen

working on wood of a kind similar to that of which the match was made. It was also argued that it was so, for such a match would not serve the purpose ascribed to the defendants, while it would answer for the plot of Phelps and Lake.

In all the points argued to prove the conspiracy against the defendants, the testimony of the government witnesses, Phelps, Westcott, and Lake, were laid aside as unworthy of credit. This was a part of the plan of the defence. The game was played boldly, but was lost. The main attack was upon Phelps, the policy being to concentrate all their force upon him, and to carry down Westcott and Lake in the crash of Phelps's ruin. The object of the attack on Phelps was, first, to mislead the jury by inducing them to suppose that his testimony was of chief importance, and that upon it alone depended the conviction of the defendants, and then, by showing that his testimony was utterly destitute of truth, to convince them that the defendants were entitled to an acquittal. Besides, their theory of a conspiracy against the defendants had its whole foundation upon the falsehood of Phelps and his associates. The attack was prosecuted with a vigor equal to the emergency. One hundred and twenty-four witnesses were introduced to testify that Phelps's reputation for truth and veracity was bad, and that they would not believe him upon oath. The prosecution at the outset, with manly confidence, met the assault boldly, withdrew all technical objections, and challenged the fullest investigation. A side issue was thus joined, and not the least of the questions passed upon by the jury was, whether Henry Phelps was a man of truth and veracity. The government introduced one hundred and one witnesses to sustain him. Much of the testimony on both sides, as might have been expected from this course of inquiry, was of the vaguest and loosest kind; and perhaps there is no better illustration than this of the advantage of adhering to the established rules of evidence in taking testimony. The evidence on the part of the defence, met as it was by the rebutting testimony, was insufficient, to say the least, to overcome the presumption in favor of the truth of Phelps's statement, which, corroborated as it was by circumstances, about which there was neither dispute nor doubt, must have been believed by the jury. This part of the defence failed, and with it perished all hope of an acquittal on the part of the prisoners. The case

of the government might possibly have stood, had the attempted impeachment of Phelps been sustained; on the proof of his falsehood alone rested the theory of a conspiracy as put forth by the defence.

According to the practice in Michigan, after the testimony was closed, J. Van Arman, Esq. began the closing argument for the government. He was followed by Messrs. Frink and Hewitt — who appeared for two of the defendants — and Seward on the part of the defence. James A. Van Dyke, Esq., closed for the prosecution. On both sides, the arguments were manly, ingenious, and able; and the conviction of the twelve defendants, against whom alone the attorney who closed for the government asked for a verdict, was simply because their guilt was too clearly proven.

The defence was extremely bold and vigorous in its manner. It assumed a high-handed course from the outset, and such a course was necessary, for there was no middle ground between that and the admission of the crime as charged. Every effort was made to enlist the sympathy of the jurors. The cry of oppression, on the part of the prosecution, was raised at the outset upon the question of bail. The first words spoken by Mr. Seward, as reported, were, —

"He had no knowledge of the merits of this case, or the circumstances attending it, except what was spread upon the record, and the assertions of his associate counsel. He found thirty-seven prisoners at the bar, all charged with the same offences. Few of them ask the boon of giving bail during the trial, that they may the better defend themselves. The amount of bail required was excessive, and if it was his case, he would rot in jail, and rely upon the sympathies of his fellow-men, before he would submit to such persecution and oppression. His advice therefore would be, if this excessive bail was persisted in, to refuse to give it."

The prosecution was assumed to be the act of the Railroad Company, and an appeal was freely made to the supposed hostility to corporations.

"It is a strife between a Corporation and the City of Detroit on the one side, and the County of Jackson on the other. Corporate wealth cannot long oppress the citizen in such a country and under such a government as this. Your verdict against these defendants, if it shall be well grounded upon the evidence, will abate a rapidly rising popular commotion; but if it shall not be so sustained by the evidence, a people who make the wrongs of each one the common cause of all, will pick strong matter of wrath out of the bloody finger-ends of a successful conspiracy. * * *

"A corporation, enjoying a monopoly of carrying the persons and property of citizens over a great national highway, and deriving from it an income exceeding by threefold the revenues of the State, has become, in this season of alarm, a power behind the State, greater than the State itself. This is not the act of citizens of Detroit, for they are a humane

people. This is not the act of Michigan, for it is a just and benignant Commonwealth. It is not the act even of the Michigan Central Railroad Company. It is the act of agents of the Corporation, who have dared to misuse their powers, and to assume the police authority of the State."

The Corporation, when such outrages were committed upon its property, and the lives of their passengers daily endangered, very naturally and properly employed agents to ferret out and discover the authors of these crimes. Their operations were necessarily secret, and they could not work without compensation. Advantage was taken of this, and these agents employed in this praiseworthy purpose are denounced as hireling spies and informers.

"This system was in operation six months. It is no wonder if oblivious memories have been awakened, malicious memories quickened, and feeble memories strengthened. All has been activity; all an activity from the beginning.

"When I look upon the men who occupy the place on my right hand, and recognise among them pioneers of the State, its farmers, mechanics, and citizens; and then on this legion of spies, and find there on the witness stand convicts yet wearing the look and the gait contracted in the State Prison, and see others come reeking from the stews of the city, I ask myself, Can it be real? Does honesty dwell in the penitentiary, and crime stalk abroad over the State? Is the city pure, and the country polluted? Has truth fled from the hearth of the farmer in the country, and taken shelter in the purlieus of the metropolis? No, I am not in Michigan; I am in Venice, where an aristocratic Senate keeps always open the lion's mouth, as well by day as by night, gaping for accusations against the plebeian and the patriot. I am in Syracuse, and see before me the dungeon which the tyrant has constructed with cells, in which he has imprisoned those whom he fears, and constructed its walls on the model of the human ear, so that its curious channels convey to him even suppressed groans, and sighs and whispered complaints."

In the assault upon the witnesses, Westcott, Phelps, and Lake, the same high ground is taken. Their entire falsity is assumed, and they are treated throughout with utter loathing and supreme contempt. Westcott is thus dismissed: "Adieu, Mr. William D. Westcott!

> 'We know thee to the bottom; from within
> Thy shallow centre to the utmost skin.'"

Of Lake they say,

"He is well looking, and his fingers and bosom are adorned with rings and golden charms, token of manifold and meretricious favor. But he is of feeble mind, and executes only indifferently well the plots of Phelps. In short, he is an illustration of the truth, 'that a pretty fellow is but half a man!'"

The utmost fury of their invective was reserved for Phelps.

"But who is Henry Phelps? He is the prosecutor on whose naked

oath fifty citizens were arrested, and upon whose oath chiefly, if not altogether, the indictment in this case was found. Upon his oath, sustained by his confederate, Lake, this prosecution is suspended. He was born in Bloomfield, Ontario county, N. Y., in 1814, a son of respectable parents who lived in easy circumstances. He removed with them to Wheatland, Monroe county, during his childhood. He received an education, which, although not a liberal one, surpassed what was ordinarily obtained in country schools and academies, and which qualified a vigorous and shrewd mind sufficiently for any kind of business, in any department of private or public life. He came to Michigan with his parents, and settled in Highland, Oakland county, in 1835. He pursued no regular occupation there, but was forward and active. He conducted litigation in Justices' Courts, and was at that time called (according to the testimony of one of his friends) 'a fine fellow.' He was elected town clerk, and commissioned as captain in the dragoons of the militia. But nothing that he began was ever finished, nothing that he planted ever ripened. Political preferment ceased, when rumors of falsehoods and frauds gained circulation. The dragoons, who enlisted under his command, never equipped, and they were ultimately disbanded. After five years thus spent he went to Michigan Centre, where Abel F. Fitch resided, and there Phelps bought a distillery and its stock, with drafts on a person in New York, who could never be found. After six months the distillery reverted, with losses, (never yet reimbursed,) to its former owner, and Phelps immediately thereafter became a merchant at Milford, near Highland, his former residence. A month or six weeks passed away, and the stock of goods was suddenly and mysteriously surrendered to the merchants, at Buffalo, from whom it had been purchased, and Phelps resumed his business as an advocate in Justices' Courts. He married about this time, and the counsel who defend him here say he has children. His affidavits were questioned, his arts in conducting trial suspected, his reputation waned, and after three or four years he was convicted of the infamous crime which has been mentioned. He was subject to occasional epileptic convulsions. He feigned them during his trial, and affected sickness to avoid judgment, but without success. He feigned illness to excuse himself from labor in the prison. Suspected and closely watched there, he failed to propitiate the police until the sixth month in the fifth year of his term had elapsed, and then he was pardoned. On coming out of prison he gathered his family in his ancient home; but habits of regular industry and domestic occupation disgusted him. He invited his associate, Lake, who had just been discharged from prison, to join him, but at first without success. After the lapse of about a year he hired himself to the District Attorney of the United States, in the occupation of what is called a *stool pigeon*, that is, one who for hire joins and leads villains in crime to betray them to justice; or, as it was described by the counsel for the prosecution, the business of a rogue 'set to catch rogues.' While in that capacity, he renewed the acquaintance which, before his imprisonment, he had maintained with Gay, and in the very first interview opened to him the plot, if he is to be believed, to screen a culprit from punishment, by a false charge of the crime of burning a depot, upon an unoffending person. Having drawn Gay into that scheme, he offered himself to the railroad company to be enrolled, and was accepted at a regular salary of forty dollars a month, as a member of their band of spies and informers. His engagement was to furnish sufficient evidence to bring Abel F. Fitch and his supposed associates to trial, for some felony against the railroad, out of Jackson county. He is cunning, pausible, bold and persevering. There he sits. Men imagine that they see his

history written in his form and features. They say that he looks lean and malicious, and that he

> 'Will look hollow as a ghost,
> As dim and meagre as an ague's fit.'"

"Gentlemen, you will next recall the deportment of the witness Phelps, during the trial. There is a living and beautiful harmony in all truth. He that is truthful to-day was truthful yesterday, and will be truthful always. Candor, modesty, meekness and gentleness, are inseparable from truthfulness. Recall the eagerness of the witness to volunteer testimony injurious to the defendants, by interpolating his answers with matter foreign to the question propounded. I give you only one instance of this. On cross-examination he was asked if he had seen Gay have counterfeit money; he replied, 'Yes, $50, and he said he got it of Fitch.' Recall the scene when he impudently confronted William Dyer, who was a respectable citizen of Indiana, and roused all the vulgar sympathies around him, here in open Court, falsely charging that respectable person with being a horse-thief in disguise. Recall the fact of Phelps's appearing in the Court-room, with his coat defaced by a pretended mark of a ball which he alleged had been fired at him on Woodward Avenue, in the streets of Detroit, in the night-time. What could he have been doing in that part of the town at such an hour? Do you believe that these defendants assailed him at that distance from the windows of their prison? Do you believe that sympathizing friends who had followed them here attempted his assassination? If so, what has secured him against assassination since that time, now nearly three months? Recall his bar-room denunciations of Amanda Fitch for perjury, and his rude affray with J. B. Toll, her defender. Recall his charge on the stand that Mr. Frink had disguised himself to procure or instigate his assassination. Recall his impudent intrusion upon you in your journies to Michigan Centre, when you went to survey the scenes described in the evidence, and to test his own veracity. Recall his still more impudent intrusion upon the presence of one of the panel in his visit without his associates, and without the presence of the defendants' counsel to the same places. Recall him as he has sat here among the ten distinguished and highly respectable counsellors for the people, nay, at their very head, advising if not directing the course of the prosecution at every stage since his own examination was closed. Enough then for Henry Phelps.

> 'Room for the Leper! Room!'"

Nor was the prosecution conducted with less vigor and boldness. Mr. Van Arman, in his address, put the case of the government to the jury with great strength; and Mr. Van Dyke, in his closing argument, followed step by step, fearlessly and unpretendingly, upon the track of his distinguished adversary, and, presenting in detail the evidence as it was, overcame the ingenious theories of the defence with the simple eloquence of facts.

In addition to the extracts above given from Mr. Seward's address, we give below his opening and his peroration, and also portions of Mr. Van Dyke's argument.

"Gentlemen of the Jury, — This is Detroit, the commercial metropolis of Michigan. It is a prosperous and beautiful city, and is worthy of your pride. I have enjoyed its hospitalities liberal and long. May it stand and

grow and flourish forever. Seventy miles westward, toward the centre of the peninsula, in the county of Jackson, is Leoni, a rural district, containing two new and obscure villages, Leoni and Michigan Centre. Here, in this dock, are the chief members of that community. Either they have committed a great crime against this capital, or there is here a conspiracy of infamous persons seeking to effect their ruin, by the machinery of the law. A State that allows great criminals to go unpunished or great conspiracies to prevail, can enjoy neither peace, security, nor respect. This trial occurs in the spring-time of the State. It involves so many private and public interests, develops transactions so singular, and is attended by incidents so touching, that it will probably be regarded not only as an important judicial event in the history of Michigan, but also as entitled to a place among the extraordinary State trials of our country and of our times.

"Forty and more citizens of this State were accused of a felony, and demanded, what its Constitution assured them, a trial by jury. An advocate was indispensable in such a trial. They required me to assume that office, on the ground of necessity. I was an advocate by profession. For me the law had postponed the question of their guilt or innocence. Can any one furnish me with what would have been a sufficient excuse for refusing their demand? *Hoc maxime officii est, ut quisquam maxime opus indigeat, ita ei potissimum opitulari*,[1] was the instruction given by Cicero. Can the American lawyer find a better rule of conduct, or one derived from higher authority?

"A word, gentlemen, on the origin and progress of this controversy — not to excuse the defendants nor to arraign the State. Fifteen years ago, Michigan attempted to stretch a railroad across the peninsula, from shore to shore. It was honorable even to fail in so noble a design. An imperfect road was built, reaching from Detroit to Kalamazoo, and was travelled by a few slothful engines. The State conducted it, as the State conducts every thing, with conciliation and kindness towards the people. Necessity obliged the State to give the enterprise over to a corporation, which speedily extended the road to the western waters and brought it into a perfect condition. Engines increased equally in numbers and in speed, and the road became a thoroughfare alike useful and important to the citizens of Michigan and to the whole country. This public gain was attended by the usual conflict between the corporation and citizens, about routes, titles, prices, stations and property unavoidably taken, injured or destroyed. The regions through which it passed were newly opened. Their inhabitants were settlers, and settlers are generally poor. Their farms were not fenced. Public roads, as well as public lands, were habitually used as ranges for pasturage. Cattle, often the settler's only convertible property, were frequently destroyed. The change was sudden and abrupt. The corporation refused to pay damages; the settler insisted on them. Litigation ensued, and failed to settle the contested claim. The corporation offered half-price, as a compromise. The settler regarded this as a concession of the right and insisted on the whole. Jealousy of wealth and power inflamed the controversy. Occasionally a settler retaliated, and ultimately several united in committing trespasses. The corporation invoked the legal tribunals, but failed for want of evidence. The controversy became embittered, chiefly in Jackson county. On the night of the 19th of November last, the freight depot at Detroit took fire and was reduced to ashes. No one dreamed, or ever would have dreamed of an incendiary, had not a

[1] The clear point of duty is, to assist most readily those who most need assistance.

public outcast, lured by the tempting rewards of the corporation, conceived the thought of enriching himself by charging the crime committed here upon persons in Jackson county, obnoxious for trespasses committed there. He secretly gave body and form to that suspicion, and on the 19th of April last it resulted in the alleged disclosure of a long concerted, profoundly contrived and deliberately executed conspiracy by citizens of Leoni for the entire demolition of the rails and structures of the Michigan Central Railroad." * * *

"Gentlemen, I trust that I have proved that the conspiracy alleged in this case, presents an immaterial issue, and is false in fact; that the case rests on evidence of admissions only, proved by three witnesses, Gay, Phelps and Lake; that the evidences of those admissions are false, because the facts supposed to be confessed are impossible, while the admissions are unworthy of credit, because they are unsupported by circumstantial evidence, and the witnesses who present them are unworthy of belief, and their testimony is contradictory, and is in conflict with facts incontestibly established. If these positions are true, it follows that this prosecution is the result of a conspiracy against the defendants. You have evidence of that conspiracy in the malicious threats of Westcott and Phelps; in an allusion by Phelps, showing an understanding with Westcott; in a negotiation between Phelps and Gay to predicate a plot on the casual burning of the depot in Detroit, on the 19th of November last, a plot for the ruin of innocent men; in the fraudulent manufacture of those harmless but fearful tokens, contrived to obtain credit for the narrative of Phelps; in the fraudulent transfer of those tokens, by those who fabricated them, to the possession of Gay and of Filley; and in the cunningly devised narrative of Phelps and Lake. But I will not follow that subject further. It belongs to another prosecution — a different tribunal — perhaps, to a distant jurisdiction. It is enough for our present purpose that the defendants are not guilty.

"Gentlemen, in the middle of the fourth month, we draw near to the end of what has seemed to be an endless labor. While we have been here events have transpired, which have roused national ambition — kindled national resentment — drawn forth national sympathies, and threatened to disturb the tranquillity of empires. He who, although He worketh unseen, yet worketh irresistibly and unceasingly, hath suspended neither His guardian care nor His paternal discipline over ourselves. Some of you have sickened and convalesced. Others have parted with cherished ones, who, removed before they had time to contract the stain of earth, were already prepared for the kingdom of heaven. There have been changes, too, among the unfortunate men whom I have defended. The sound of the hammer has died away in the workshops of some; the harvests have ripened and wasted in the fields of others. Want, and fear, and sorrow, have entered into all their dwellings. Their own rugged forms have drooped; their sunburnt brows have blanched; and their hands have become as soft to the pressure of friendship as yours or mine. One of them — a vagrant boy — whom I found imprisoned here for a few extravagant words, that, perhaps, he never uttered, has pined away and died. Another, he who was feared, hated and loved most of all, has fallen in the vigor of life,

> 'hacked down,
> His thick summer leaves all faded.'

When such an one falls, amid the din and smoke of the battle-field, our emotions are overpowered — suppressed — lost in the excitement of public passion. But when he perishes a victim of domestic or social strife — when we see the iron enter his soul, and see it, day by day, sinking deeper and deeper, until nature gives way and he lies lifeless at our feet — then

there is nothing to check the flow of forgiveness, compassion and sympathy If, in the moment when he is closing his eyes on earth, he declares, 'I have committed no crime against my country; I die a martyr for the liberty of speech, and perish of a broken heart' — then, indeed, do we feel that the tongues of dying men enforce attention, like deep harmony. Who would willingly consent to decide on the guilt or innocence of one who has thus been withdrawn from our erring judgment, to the tribunal of eternal justice? Yet it cannot be avoided. If Abel F. Fitch was guilty of the crime charged in this indictment, every man here may nevertheless be innocent; but if he was innocent, then there is not one of these, his associates in life, who can be guilty. Try him, then, since you must — condemn him, if you must — and with him condemn them. But remember that you are mortal, and he is now immortal; and that before the tribunal where he stands, you must stand and confront him, and vindicate your judgment. Remember, too, that he is now free. He has not only left behind him the dungeon, the cell and the chain; but he exults in a freedom, compared with which, the liberty we enjoy is slavery and bondage. You stand, then, between the dead and the living. There is no need to bespeak the exercise of your caution — of your candor — and of your impartiality. You will, I am sure, be just to the living, and true to your country; because, under circumstances so solemn — so full of awe — you cannot be unjust to the dead, nor false to your country, nor to your God."

The following extracts are from Mr. Van Dyke's argument: —

"Gentlemen of the jury, — while in some respects I rejoice, in others I regret that we are here to-day. I rejoice that although, during the long period we have spent together, death has swept away some connected with this trial — that although disease has at times visited you or your families, yet that God in his Providence has, amid your prolonged and arduous cares, preserved you in health and vigor to discharge the high duty you owe to them and your country. I am glad that we can here apply our minds to the calm investigation of truth; that while the sun of heaven lights up our beloved city, and sheds its radiance upon the fields and forests and beautiful river within our vision, we can sit free from the excitements of life, and with an eye single to the ends of law and justice, devote our best energies to the necessary, though laborious task of a fair and candid examination of the mass of evidence which has accumulated in this cause. I regret, on your account, that the responsibility of a decision has fallen upon you, and for myself that it has devolved upon me to say aught about these unfortunate prisoners, yet they are duties that may not be passed by or put aside. That you will discharge your duty in justice, though tempered with mercy, I have no doubt. I would, gentlemen, that I could perform mine as well You must expect from me, gentlemen, no eloquent declamations, for I will frame no dazzling theories upon a misrepresentation or perversion of the testimony, whether accidental or designed. I will not weave a single wreath of fancy, but will seek to bind your minds and my own to the plain and unadorned truths that are apparent in this case, and which alone should influence you. Although I have to follow in the wake of elaborately prepared and eloquent speeches, I will not seek to emulate them. I will neither quote Latin, nor decorate my periods by selections from the classic pages of Addison; nor will I follow the counsel through his terrible philippic upon the leading witness of the prosecution, which I fear lost much of its force upon minds familiar with the strangely similar portraiture of Junius drawn in the 'Vision of Judgment.' But while I refrain from pursuing the meteoric fancies, eloquent philippics, and sub-

lime apostrophes to the 'sainted dead,' which have shed a false though brilliant light upon the dark details of crime revealed to you day by day, I will go through the case fairly and discuss it fully. I will 'nothing extenuate, nor aught set down in malice.' I will base my arguments upon the testimony, not as I would have it, but as it is. I will speak, not to the world, but to you, who can correct and hold me in judgment, if I fail to redeem the promises of fairness and candor which I make. Heaven can witness for me that I desire no fame at the expense of these unfortunate men. I will use no bitter words; I will affect no bitter loathing; I will assail neither man, woman or child, except under the urgent pressure of duty and necessity. I wish I could be spared the painful task of doing so at all. During our labors death has visited some of those who awaited your judgment — it is to be regretted. By none was it more lamented than by myself and the gentlemen associated with me for the prosecution. I hoped that respect for the inscrutable decrees of Providence would have sealed all lips upon that sad occurrence. If it had rested with the prosecution, the dead, however guilty, would have been suffered to slumber in silence. Neither you nor I could close our eyes to the solemn fact that 'those who were, are not.' Death was in our midst, and though silence might veil its horrors, like the skeleton at the Egyptian feast, its unseen presence was felt by all. But for no purpose, for no end, not even to convict the guilty, would the prosecution have invaded the tomb, and dragged the image of its lifeless tenant before you, either for unseemly invective or scarcely less seemly panegyric. The counsel for defendants have judged otherwise — it has seemed to them wise and proper to tear aside the veil that divides the living from the dead, and to invoke the 'sainted spirit' of the leader of these defendants — a phantom, gentlemen, that I know will fail in the design of frightening you from your propriety, but the invocation of which entails on me, in certain portions of my argument, the painful duty of speaking of the dead and their deeds, in terms which I would fain use only of the living. It would be unseemly to seek occasion to probe the deeds and motives of those who are no longer of this world, but it would be criminal weakness to shrink from the task when duty demands its performance." * * *

"Gentlemen, in this case, I cherish no resentment. I feel no wound. My breast bleeds from no poisoned shaft My heart harbors no other feeling than kindness to all concerned, and most happy would I feel, if, consistently with duty, I might avoid saying a single word that could bear a personal application to counsel or others. But the stern dictates of duty compel me to say that the learned counsel who has preceded me, has argued to you upon a false basis — whether it was the result of accident or design, it is not for me to insinuate. But it is for me now to say, and hereafter to show to your entire satisfaction, that you have not been frankly dealt with. The testimony was presented to you, through a false and discolored medium. After the announcement made several days since, by one of the counsel for defence, that their entire time, from almost the commencement of this case, had been occupied in making extracts, analyses, codifications, and tables of the testimony, which would be presented for your consideration by his distinguished associate, I did expect that matter, so laboriously and elaborately prepared, would have been characterized by at least some show of fairness and candor. Has it been? The coloring of testimony is one of the most frequent errors of counsel; where this arises from warm and hasty discussion, it is excusable — for it is natural that the mind heated by debate and recalling the evidence, by the sole aid of fallible memory, should lend to it the tinge and hue of its own warm hopes and feelings. But whether the same charitable excuse can be extended to

written tables and extracts — 'cold inanimate matter' — compiled line by line and figure by figure, by the sun's bright beam, and the lamp's glimmer, it is not for me to say; but it is free for you to judge. If the fervent zeal of counsel has led them unconsciously into this error, far be it from me to censure them, or do more than correct their mistakes. The office of advocate is one of the highest trust and confidence. In no other relation of life does man place all that he can love and cherish so entirely in the hands of his fellow; and he is unfit to discharge its sacred duties, who has not zeal, and sympathy, and ardor sufficient at times, amid the hot excitement of argument to lead him even into errors. Faults thus arising, partake largely of the characteristics of virtue; they spring from the same source as our holiest emotions, our best and gentlest feelings hang around them in graceful drapery; and though duty might compel me to remove the veil, I would do it gently, and not with a ruthless hand.

"But it is different when these errors spring not from impassioned ardor, but from midnight study. In the latter case, they should arm jurors with a degree of suspicion, but of all this you will have to judge. It is mine to tell you that the testimony has been unfairly stated to you, and that almost every point taken by the learned counsel has been erected upon a mis-statement of the evidence. I am conscious, gentlemen, that this is a bold statement; and that if I fail to maintain its truth, it will react upon the prosecution. But if you follow me carefully as I review the argument of the counsel, and read the testimony in connection — not from manuscript extracts, but from the printed evidence which many of you hold in your hands — I have no fear that you will deem I have overstepped the bounds of truth.

"The learned counsel has solemnly informed you that this is Detroit — a proposition based upon truth, and to the entire accuracy of which I am thrice happy to assent.

"He has further informed you, that upon the line of the Central Railroad there are some humble hamlets constituting Leoni; that fifteen years since, the Legislature of this State commenced the construction of a great thoroughfare, which passed through that same town of Leoni; that its agents were kind to the people, and the peaceful occupants of this 'small district' reciprocated the feeling: no cattle were killed; the engine and its train passed safely by — and no murmur of complaint disturbed the quiet harmony of the scene; that in an evil hour, the State, forgetting what was due to herself and the people, sold the road to a heartless and greedy corporation. Then the scene was changed — tyrannic agents frowned — cattle were killed; complaint was followed by imprecation, and amid the humble hamlets of Leoni was commenced a struggle, which, in a form of justice, a grave and distinguished Senator tells us 'can have but one end in a country where jealousy of corporate power can never be suppressed.'

"Such, gentlemen, is the fancy sketch drawn for you by the defence. It is simply *untrue*. But you must permit me to tender my meed of admiration to the luxuriant imagination that could paint such a scene from such materials — one so gently beautiful, so unique, so totally unlike any thing that was ever seen or dreamt of round 'the *rural* districts of Leoni.'

"Gentlemen, the true history of the road tells an entirely different tale: that from the hour when the first locomotive left this city, down to the hour when the State sold her interest to this corporation, there was nothing but trouble and heart-burnings from this very cause; and in this very town of Leoni, that among the very first who raised the cry of complaint and hostility, was Abel F. Fitch; and that the seeds of enmity which have since ripened into such bitter fruit were planted and had sprung

to goodly growth, even while the road was still managed by 'the kind and gentle agents of the State.'

"I tell you, as a matter of history, that the Company has, in respect to cattle killed, pursued the same policy as did the State. I will show you the truth of this, and then you will judge of the consistency of eulogizing the one and denouncing the other. When the late Mr. Wells was superintendent, the State refused to pay for cattle killed; afterwards, perhaps, as *elections* approached, it did pay for a while, but soon found it was creating a cattle market at every crossing on the track; that to pay for such *accidents* (*?*) would drain the entire revenue of the road; and the old and only true policy was adopted. I will read you a sentence from the Report of the Board of Internal Improvement made in 1845, while the road was still managed by the State, and then tell me if it is I or the counsel who paints your fancy scenes! I refer to Joint Documents of 1846, No. 4: —

"'The amount paid for killing and maiming cattle is becoming enormously large. If animals are allowed to run upon our tracks, very many must inevitably be killed; and when no want of care on the part of the engineer be proven, should not the loss fall *entirely* upon the owner of the property destroyed.' 'If the owner is not debarred from collecting any portion of the loss, should he not at least share in the risk, say to the amount of one half of the damage?' Such was the policy of the State, and the latter and kindlier of the above suggestions has been the policy of the Company; and the people along the line, save only in Leoni, have generally acquiesced in it.'"

During the progress of the trial, the usual questions of law raised in conspiracy cases, with regard to the admissibility of evidence as to the acts of the alleged conspirators, until the conspiracy was shown, and on similar points were raised by the counsel for the defence. One point was, How far the admissions of Gay — who died before the trial commenced — affected the conspirators? The same question arose upon the death of Fitch during the trial; and another, as to how far his death would have the effect of arresting the entire trial. After the death of Fitch, his widow was put on the stand by the defence, but her testimony, so far as it was cumulative, was ruled out by the Court in its discretion.

We cannot close our notice of this case, without paying a deserved tribute to Mr. Justice Wing, who presided at the trial with great patience, impartiality, and fairness. His summing up gave to the jury a brief though fair statement of the theories of the case presented by the prosecution and the defence, and his instructions upon the several exciting topics, touched upon in the arguments of counsel, and upon the general duties of jurors, were judicious and well-timed.

Recent English Decision.

Court of Vice-Admiralty, Halifax, N. S., September, 1850.

Before the Honorable ALEXANDER STEWART.

THE STAR, LE CRAS, Master, RICHARD MCLEARN, ET AL., PROMOVENTS *v.* DONALD SCOTT, IMPUGNANT.

Salvage — Passengers and Seamen, when Salvors of their own Ship — Affidavit not Admissible in Evidence when Jurat is without Date — Costs.

THE promovents who were on board the Star, a brigantine of ninety tons, claimed compensation for salvage service, alleged to have been rendered by them in saving "The Star," after a collision had occurred at sea, and the vessel had been abandoned by her master and crew. The facts were briefly these. Soon after leaving port, and when about forty miles from land, the Star, owing to unfavorable weather, was hove to for several hours. While thus laying to, she was run into by the brig L'Empereur, of one hundred and forty tons. Both vessels were greatly injured by the collision, and getting entangled and locked together by their rigging, they were damaged still more by the wind and heavy sea. At the first shock, fearing that the Star would sink, all on board went aboard the brig for safety. While the vessels were locked together, the promovents and another seaman of the Star returned on board her, and immediately afterwards the vessels parted, leaving the master and the two others of the crew of the Star on board the other vessel. Both vessels, in a few days, succeeded in reaching a port of safety, the Star being brought to a harbor by the promovents and the other seaman in three days after the collision.

One of the promovents claimed compensation for salvage service as a passenger, because he had not signed the articles of the Star, and was to pay for his passage by labor on board the vessel; but the Court decided upon all the proofs, that he was not a passenger in the legal acceptation of that term, but was one of the crew. The Court also held, that under ordinary circumstances passengers were not entitled to compensation as salvors of their own ship; (Abbott on Shipping, 666, 667; 2 Hag. R. 3); though they would be

so entitled under extraordinary circumstances. *The Two Friends*, (1 Rob. 272); *Newman* v. *Walters*, (3 B. & P. 612.)

The Court also decided that the temporary desertion of "The Star," caused by sudden fear, was not sufficient to constitute her a derelict, as she was not abandoned by her master and crew without hope of recovery; the pleadings not stating that the crew left her without the intention of returning, and the master swearing that he was only prevented from returning by the sudden separation of the vessels. (1 Rob. 40; 1 Sumner, R. 209.)

The question then recurred, whether the promovents could be considered salvors of their own ship, and whether compensation for salvage service could be awarded them; and this Mr. Justice Stewart decided as follows:

"Before adverting to the American doctrine and decisions, to which I have been referred, I will examine the English cases, having attentively considered not only all the authorities cited, but many others not mentioned at the bar. The case of the '*Neptune*,' (1 Hag. 236,) was for wages out of the proceeds of the wreck saved by the exertions of the mariner, and it was contended for the owners, that the sailor was not entitled to wages, because freight was not earned, but that he might be entitled to salvage if he had proceeded for service as a salvor. Lord Stowell says, 'What is the obligation which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favorable weather, but likewise in adverse weather inducing shipwreck, to exert himself to save as much of the ship and cargo as he can. It is a part of his bounden duty in his character of a seaman of that ship.' It is a laborious, and probably a dangerous portion of his services, but certainly not less severe and meritorious on these accounts.

"In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to the vessel, which he contemplated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages. But say they, He should have it by way of salvage, or a *quantum meruit*. There are, I think, decisive objections to both those views of the matter. The doctrine of this Court is justly stated by Mr. Holt, that the crew of the ship cannot be considered salvors. (Holt on Navigation, 522.) What is a

salvor? A person who, without any particular relation to a ship, in distress proffers useful service, and gives it as a voluntary adventurer without any pre-existing covenant, that connected him with the duty of employing himself for the preservation of that ship. Not so the crew, whose stipulated duty it is (to be compensated by wages) to protect that ship, through all perils, and whose entire possible service, for this purpose, is pledged to that extent. Accordingly we see in the numerous salvage cases, that come into this Court, 'the crew never claim as joint salvors, although they have contributed as much, (and perhaps more than) the volunteer salvors themselves.' In illustration of the last remark, I may refer to the case of the *Salacia*, (2 Hag. 269,) where liberal salvage was awarded to the master and crew of the 'Washington,' and a very moderate sum to the crew of the 'Dart,' but no claim whatever was made or thought of, on the part of the master and crew of the 'Salacia,' the vessel saved from the rocks, although similar joint services in getting the vessel off were performed by the crews of all these vessels. It had become a question whether the crew of the 'Dart,' who had been wrecked, and taken on board the 'Salacia' before her shipwreck, was not so connected with the 'Salacia' as to prevent them being entitled to salvage compensation for their laborious services.

"In the case of the '*Active*,' (14 Jur. 606,) decided by Dr. Lushington on 30th May last, no claim of salvage services was set up by the remaining crew of that vessel, although their services must have been absolutely necessary to work the ship, and equal to those rendered by the salvors. The circumstances of that case were as follows: The 'Tartar,' whilst on her voyage from Calcutta to Boston, United States, in latitude 13 north, and longitude 46 west, fell in with a brig with a signal of distress, which proved to be the 'Active' of one hundred and seventy tons burthen, laden with sugar from Pernambuco to Hamburgh. The master of the 'Tartar' on boarding the brig, found that shortly after she had left Pernambuco the yellow fever had broken out on board, and had already destroyed seven hands of a crew, consisting originally of eleven, including the master; that the master was then actually dying; that of the three remaining, one had lost the use of his right arm, and that none of them were acquainted with navigation. On the captain's return to the 'Tartar,' the

second mate and one seaman immediately volunteered, and having been put on board they succeded in bringing the ship and cargo safely into Falmouth. The master of the 'Active' died soon after they came on board. £1500 was awarded to the master, second mate, and seaman, of the 'Tartar,' but nothing was awarded or claimed by the three remaining crew of the 'Active;' and yet it must be evident that the two men from the 'Tartar' could not alone have worked the vessel, and brought her from that latitude and longitude safely into Falmouth, without the assistance of the three remaining crew. In the *Jane Waye*, (2 Hag. 338,) and various other cases, there is the same absence of claim. Indeed, in the *Governor Raffles*, (2 Dodson, 14,) where the crew had rescued their vessel from some Malay mutineers, who had risen upon the master, and taken possession of the property, Lord Stowell rejected their claim as salvors, stating, 'That it is the bounden duty of the crew to give every assistance in their power, to prevent or quell a mutiny, and to use their utmost endeavors to preserve or recover the possession of the vessel and goods of their employers. The case is entirely different from that of a rescue from an enemy, because there the moment the capture is effected, the crew are discharged from their duty to their employers, the contract between the parties is at an end, the seamen no longer constitute the crew of the vessel, but become prisoners of war. Not so in the case of mutiny, for that does not discharge them from their duty to their owners, whose property they are bound, if possible, to recover;' and he adds, 'I should be unwilling to make a precedent, and to extend the doctrine of salvage beyond the limits in which it has hitherto remained, by introducing a new species.' We have also the opinion of Lord Alvanley, that seamen cannot sustain a claim for salvage services afforded to their own vessel. In the case of *Newman* v. *Walters*, (3 B. & P., 612,) previously referred to, in which it will be remembered the captain and part of the crew had deserted the ship, (then in a dangerous situation upon the Chichester Shoals,) leaving the mate and residue of the crew with passengers on board. His lordship says, 'The crew indeed ought not to desert the ship, so long as they can possibly remain on board; and if the mate, in this case, had saved the ship by doing what the plaintiff did, he would not have been entitled to claim salvage.' Lord Stowell's doctrine in the case of the

'*Neptune*,' decided in 1824, was recognised and acted upon in 1843 by Dr. Lushington, reported in 2 W. Rob. 119, and also in 7 Jur. 542, when, in almost similar circumstances, he held the seaman entitled to his claim for wages out of the proceeds of the wreck, and repudiated the doctrine of salvage in such case being applicable to the seamen. The '*Reliance*,' (7 Jur. 542.) Dr. Adam, in argument of the '*Neptune*,' says, 'No one hath hitherto been bold enough to bring sailors forward for a salvage on their own ship;' and I cannot find any English case since that time, when such claim has been preferred. It must be owned that the absence of such a claim is strong presumptive evidence, that in England it is unsustainable.

"But it has been urged, that a different doctrine is held in the United States of America; that I am sitting here to render to the promovents the same reward that an American seaman, if he were preserving an American vessel, would be entitled to claim from an American owner at my hands; that the law I am administering is the law of the whole maritime world; that this Court has, in this respect, no locality; and that if, in my opinion, the American be preferable to the British doctrine, the promovents are entitled to my judgment; leaving the impugnant, if he be dissatisfied with it, to appeal to the judicial committee of Her Majesty's privy council.

"I apprehend, however, that this proposition is too extensive, — that, as a British Judge, I am bound to administer to all the law maritime, as it is administered by British tribunals; and that if one principle were established by the ultimate appellate tribunal in England, and another principle upheld by the most able jurists of a foreign country, I should be constitutionally, as well as morally bound to adopt and give efficacy to the British, and not to the foreign principle.

"Now, although there is no such decision as absolutely precludes me from considering and adopting the American authorities, (I mean none of the House of Lords, or of the judicial committee,) yet we have the decisions of some of the most eminent jurists whom the world has ever known directly against the claim. We have the recorded opinions of Lords Stowell and Alvanley, and of Dr. Lushington. We have seen that in cases where, if ever a claim for salvage, on the part of one of the crew, might have been preferred, none such was suggested; and we have noticed

that counsel in argument has asserted, without the dissent of the bar or the Court, that no person ever thought of setting up such a claim in England. It is true that none of those decisions are of the judicial committee, or of the House of Lords, and, therefore, may not technically and legally coerce my judgment. But I must be convinced beyond all possibility of doubt, that they were erroneous, before I venture to dissent from them. They were submitted to by the parties, — the doctrine they establish is stated in the text-books, and recognised as law in Westminster Hall.

"It is due, however, no less to the importance of the subject, than to the respect which is justly due to the great men of America, who have adopted the opposite view, to consider it somewhat at large in connection with the case before the Court. But before I proceed to the American authorities, I will dispose of the cases cited for the promovents relative to pilots, and determine the incidental points which were made on the trial.

"The cases relative to pilots have no bearing on this question. 'Pilotage,' says Dr. Lushington, (8 Jurist, 365,) 'is confined to conducting into port a vessel in no state of alarm, or having no apprehension of distress arising from antecedent causes;' and (in 9 Jur. 191) he says a pilot is entitled to a *quasi* monopoly. 'He is paid, not in conformity with the nature of the service he performs, but in conformity with the draught of the vessel, and I must assume that this rate of pay is sufficient.' They are, therefore, only bound to do the mere duty of pilot to vessels ordinarily sufficient, but if the vessel is in distress, and requires service beyond his duty as pilot, what he affords, he will be entitled to compensation therefor in the nature of salvage service. In the '*Frederick*,' (1 W. Rob. 17) Dr. Lushington says, — 'It is a settled doctrine of this Court, that no pilot is bound to go on board a vessel in distress, to render pilot service, for mere pilotage reward.' If a pilot, being told he would receive only pilotage reward, refused to take charge of a vessel in that condition, he would be subject to no censure, and if he did take charge of her, he would be entitled to a salvage remuneration. A pilot has a statutable duty imposed on him, to vessels in ordinary circumstances, and is entitled therefore to the statutable reward. If he render service which he is not bound to perform to a vessel in distress, his service will be exalted

into the nature of salvage service. Then as to the incidental points,

"1st. The Advocate-General objected to the admissibility of the promovents' affidavits, on the ground of interest; but the cases cited by him in support of his objection (2 Hag. 151) show, that the testimony of salvors, and parties interested, must frequently be admitted from the necessity of the case, and that this must be determined by the judge, who exercises his discretion, in receiving or rejecting all such parts of the testimony, except those which relate to facts occurring at the time of the alleged salvage service, and of which, in some cases, the salvors are the only witnesses.

"2d. The second objection is of a graver nature, viz., a want of date to the jurats of the affidavits of Landrea, 162, (Roach, 161, and McLean, 162.)

"This objection, so far as I can ascertain, has never been made in the Admiralty Court, although it is familiar to the Common Law Courts, and by them invariably sustained. In a very late case, reported (14 Jurist, 62) and decided on 8th June last, Lord Campbell says, 'I do not think nice questions ought to be left to be raised on an indictment for perjury. There is a settled rule that the jurat of an affidavit should contain the date on which it was sworn. It does not do so unless the day, month, and year were mentioned. I think the broad rule ought to be observed. In this jurat it is violated, and, therefore, the affidavit cannot be read.'

"On the ground that a question might be raised on an indictment for perjury, and because all the forms in the appendix to the rules and regulations, contemplate a date to the jurat, I uphold this objection.[1]

"I will now turn to the dicta and decisions of the Judges of the United States of America, and it is evident that long previously to Lord Stowell's judgment, in the case of the '*Neptune*,' some of the American Judges had put the sailor's claim (for compensation) upon the wreck of their own vessel, saved by their exertions, on the ground of salvage, taking the rate of wages as the measure of such compensation; and since then, although not universally, the majority of those judges have held, and still hold, that doctrine.

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[1] Two other incidental objections, of local interest and value merely, were made and overruled.

Kent, in his Commentaries, (3 Kent, 195,) states it to be the correct doctrine; and Judge Story, in his judgment given in 1821, reported in 2 Mason, 338, deciding that wages were not recoverable in such a case, says, (page 335,) 'Whatever may be the true doctrine on the subject in respect of wages, I am clear upon principle, that seamen are entitled to salvage for their labor and services in preserving the wreck of ship and cargo, or either of them.' Sixteen years afterwards, (in 1837,) he speaks more cautiously. In a case reported in 3 Sumner, 60, he says, 'There are exceptions to the general rule, (*i. e.*, that freight is the mother of wages.) In case of a shipwreck during the voyage, the seamen, if they remain by the ship, and assist in the salvage, will be entitled to recover their wages out of the fragment of the wreck, if enough to pay them, although the entire freight is lost.' And after noticing the case of the *Neptune* and others, he remarks, — 'Whether this exception is to be expounded upon the ground of its being an allowance to the seaman in the nature of salvage, or whether it is a mere dry exception to enforce the public policy of the original rule, has been a topic of some judicial discussion.' Judge Hopkinson, in 1829, (Gilpin's Reports, 66,) says, 'Whether a seaman can in any case become a salvor for services rendered to his ship in any extremity of danger or distress, is another question upon which I do not now give any opinion. Great judges have differed about it.'

"A great many of the American cases are referred to in the last American edition of Lord Tenterden's work, (p. 752.) The English editor in the text (753) says, 'Lord Stowell expressed his dissent from an opinion which has long prevailed, and is now established in the Courts of America, that the mariners' right to wages, in such cases, is in the nature of a claim for salvage remuneration;' and in page 756 he says, — 'Dr. Lushington expressed his entire concurrence in the principle of Lord Stowell's decision.' In a note of the American editor, (p. 752,) he remarks, — 'The colony laws of Massachusetts, of 1688, requiring the mariners, in case of shipwreck, to save the property out of which they shall have *a meet*, for their pains,' may have had some effect in producing the American opinion and decisions; but the judges seem to have considered the maxim of maritime law, 'that freight is the mother of wages,' of so universal application, and so strin-

gent, that wages could not be recovered without freight earned, and, to escape out of the difficulty, have introduced the principle of salvage in cases of perils where sailors save property. (2 Mason, 319.)

"The Courts of the United States of America have extended that principle very far in the case of *Hobart* v. *The Dragon*, (10 Pet. 108,) and *The Blaireau*, (2 Cranch, 240,) although the decision in the latter case 'was against the opinion of that able jurist, Mr. Justice Washington.' (Abbott, 753.)

"In the wreck of the '*Massasoit*,' Dec. 1844, Judge Sprague remarks, that, 'To allow mariners, in case of shipwreck, to claim as salvors, would not only be inconsistent with the contract of hiring, but a startling violation of that principle of maritime policy, which sedulously endeavors to bind up the interest of the mariner with that of the owner. It would be not only an inducement to relax his efforts in time of difficulty and danger, but a direct temptation to cause shipwreck and disaster, that he might successfully claim the large reward of salvage service.' It appears, therefore, that the opinion so generally acted on in the American Courts is not altogether satisfactory, even to many of their own judges.

"In examining the American decisions, it will be found that different reasons for holding such doctrine have been given by different judges, — some of them putting it on the ground of a new contract, others on an equitable consideration for services rendered; but all who have given effect to it declare, that the wrecked property must be saved by the exertions of the seamen claiming such salvage remuneration. Curtis, in his Rights of Seamen, reviewing the cases, (p. 287,) says, 'It would seem that the distinction between a claim for salvage compensation, and a claim for wages, is but shadowy;' but when we consider the case of the '*Reliance*,' (decided by Dr. Lushington, after Mr. Curtis had published his work,) it will, I think, be found that the distinction is substantial and not shadowy; for, according to the American doctrine, the administrator of the seaman, who in that case had perished on the wreck, could not claim salvage, because none of the materials were saved by his exertions. If the claim of the administratrix for wages had not been upheld, no other claim, out of the same materials, could have been sustained in America. The English doctrine is, therefore, more beneficial than the American, for the mariner, as well as for the owner.

"In the case of *Mason* v. *The Blaireau*, a seaman, (who had accidentally been left on board by the captain and crew on abandoning the vessel,) was allowed to claim as a joint salvor on the ground that his original contract was dissolved. I have already noticed that Judge Washington dissented from the judgment; the case itself is very peculiar, and I have little doubt but that the decision would have been different in England. Nor can I think that the doctrine of Judge Story in *Hobart* v. *The Dragon*, (10 Pet. 108,) 'That while the contract remains undissolved, seamen who exceed their proper duty may claim as salvors,' will be recognised or acted upon in the English Courts. But it is not requisite to determine whether the last two cases conflict with the decisions in England, because there can be no doubt that, upon the question whether a seaman is entitled to wages or salvage in case of wreck, the American doctrine and decisions do not accord with the judgments of the High Court of Admiralty of England.

"In other points, the American and English authorities agree. They concur in holding that shipwreck does not dissolve the mariner's contract, and that it is the duty of the crew to labor as long as there is any thing to be done in the preservation of the vessel and cargo, out of which, if saved, they will be entitled to their wages; and that it is the mariner's duty to rejoin the ship if opportunity offer. (1 Pet. Adm. Rep. 130.)

"In the case of the '*Antelope*,' Judge Bee decided, that salvage was not due for the rescue of a neutral vessel out of the hands of a belligerent who had taken possession for a supposed breach of treaty, or of the law of nations, which is in accordance with a decision of Lord Stowell in a somewhat similar case. Now Curtis, in reviewing the American authorities, divides the cases of seamen entitled to salvage into two classes: First. 'Where the mariners' relation to the vessel has been dissolved *de facto*, or by operation of law, as if the master or his successor in authority, in case he may have perished, had abandoned the vessel, and authorized the crew to leave her.

"'Second. Where the relation is not dissolved, but all parties continue to labor in their legal duty; but where the service in saving the property is highly meritorious, the hazard very great, and the mariner may seem to have exceeded the demands of his ordinary duty, that a claim seems in equity to arise for a further compensation than the pittance of wages that may be due.'

"For the first position he cites the case of the '*Blaireau*,' and Lord Stowell's saying in his decision of the '*Neptune*,' viz., 'I will not say, that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves, that might induce the Court to open itself to the seaman's claim of a *persona standi in judicio;* but they must be very extraordinary circumstances indeed, for the general rule is very strong and inflexible, that they are not permitted to assume that character.'

"Adopting, as I am bound to do, the doctrine of the English Courts, and preferring it to that which prevails in America, it is my duty now to inquire, whether the circumstances of this case are of the very extraordinary character contemplated by Lord Stowell; whether they are such as to call on me to depart from the very strong and inflexible rule of which his lordship speaks. * * *

"The American doctrine of inquiring into the circumstances of each case, to ascertain whether seamen had, or had not exceeded their particular duty, is a very vague and unsafe ground for judicial decision, and as to which judges may take very different views of the proper duty of a seaman. Judge Story was evidently impressed with this difficulty when he felt it necessary to state, 'That it is incapable of definition apart from circumstances.' But the clear and intelligible rule acted upon in England keeps us free from every difficulty, and is a sure and safe guide to a judge in determining the rights of parties, while its further tendency is to prevent unnecessary litigation."

The learned Judge, after discussing the evidence in the case at considerable length, concludes as follows:

"If therefore I were at liberty to hold the law to be, as it prevails in the United States, the promovents have not brought their case within it; under the maritime law (as it is administered in England) their claim has no foundation whatever. Two questions yet remain; the first, whether I can award them wages; and, secondly, as to the costs.

"As to wages: — In the case of the *Two Catherines*, (2 Mason, 319,) the libellants claimed wages; or if they were not held entitled thereto, they claimed salvage remuneration for their services. Here the promovents claim only as salvors, they have not asked for wages. It is not improbable if they had only required wages, the owner would have paid them, and this litigation been avoided.

But they have throughout insisted on salvage remuneration. It would therefore be unjust to the owner, after the promovents have put him to the expense of defending this suit, to claim for wages, which, for aught that appears to the Court, he would have paid without suit.

"It is a general rule applicable to the Admiralty as to other Courts, that a party must recover *secundum allegata et probata;* and the case of *Adams* v. *The Brig Sophia* (Gilpin's Reports, 77) is in point, and conclusive against the promovents. The objection in the case of the '*Neptune*,' made by the defendants was, that the claim ought to have been for salvage and not for wages. This objection could have been for no other purpose than to defeat the whole suit; for if it had been in the discretion of Lord Stowell to give salvage where wages only were claimed, the objection would have been futile on the part of the defendants.

"As regards the costs:—The promovents did not conduct themselves properly after their arrival at Manadieu; and this, in a case of salvage, is always a subject of inquiry. Judge Story, in 1 Sumn. 340, says, 'The merit of salvors is not in saving the property, but in saving and delivering it to the owners.' In this case the promovents forcibly detained the vessel from the owner, until he was compelled to resort to legal measures to obtain his own property. Dr. Lushington on the 7th of last month, in the case of the '*Barefoot*,' in giving judgment, says: 'I am of opinion that the Lewis's and their party, if they had any claims on account of their early exertions, have forfeited the same, by their gross misconduct and forcible resistance to the authority of the owners. This conduct was most censurable; they were not entitled to salvage, and it is therefore the duty of the Court to pronounce against their claim with costs;' and he acted on the same principle on the 15th May last, in the case of the '*Jane*,' (14, Jur. 676.)

"Under these authorities, I pronounce against the promovents' claim, with costs."

Recent American Decisions.

Supreme Judicial Court of Massachusetts, Worcester, October Term, 1851.

EDWIN BACON *v.* THE INHABITANTS OF CHARLTON.

In an action against a town to recover damages sustained by reason of an obstruction in a highway, a tender by the defendants, before action brought, of a certain sum to the plaintiff in full for his damages, and a payment of the same into Court on the return-day of the writ, admits the plaintiff's cause of action, and all that it is necessary for him to prove in order to sustain it.

In an action for such injury, groans or exclamations of pain at any time, are admissible in evidence, though referred by word or gesture to the locality of the pain, being expressions of present pain or agony; but any statement of his condition, made as a narrative, or in answer to a question, is inadmissible.

THIS was an action to recover damages sustained by the plaintiff, by being thrown from his carriage, while travelling through the town of Charlton, in consequence of an obstruction in the highway. Before action brought, the defendants tendered the plaintiff $245 in full for his damages, and upon the return-day of the writ paid the same into Court. At the trial in the Court below, Hoar, J., ruled that the tender admitted the plaintiff's cause of action, and all that was necessary for him to prove to sustain it, and that the only question open was one of damages, and that the defendants could not argue to the jury, that the plaintiff had been guilty of carelessness on his part, in mitigation of damages. The Court also ruled, that groans or exclamations of pain, though referring by word or gesture to the locality of the pain, were admissible in evidence as expressions of present pain or agony; but that any statement of his condition or feelings, by way of narrative, was inadmissible; and to both these rulings the defendants excepted.

B. F. Thomas and *G. F. Hoar*, for the plaintiff.

Emory Washburn, for the defendants.

The opinion of the Court was delivered by BIGELOW, J. The first question presented by the bill of exceptions in this case, for our consideration, relates to the effect of the tender made by the defendants under Revised Statutes, ch. 25, § 23, which is as follows:

"If before the entry for any action, (for damages sustained by a defect

or obstruction in a highway,) the defendant tender to the plaintiff the amount which he would be entitled to recover, together with all legal costs, and the plaintiff do not accept the same, and do not recover upon the trial more than the sum so tendered, the defendant shall recover his costs."

It is a well settled rule, that a tender, in cases where it is allowed at common law, operates as a conclusive admission by the defendant of every fact, which the plaintiff would be obliged to prove, in order to maintain his action. (5 Bac. Abr. Tender, *N.*); *Burrough* v. *Skinner*, (5 Burr. 2639); *Huntington* v. *American Bank*, (6 Pick. 340.)

The chief reason on which this rule is founded, is, that it is a reasonable and just inference from the act of a party, because no one can be supposed to offer money in satisfaction of a cause of action, the existence of which he denies. It is very obvious, that this reason is quite as applicable to a tender allowed by statute as to one at common law, and would fully justify the application of the same principle to cases arising under the statute, unless there is some express provision of law which militates with it. Now, by reference to the statute, it will be found that there is no limitation or qualification of this right. It gives the party a right to tender a sum for damages before entry of action. It does not specify how it is to be made, or what proceedings are to be had in the suit after entry, in order to render the tender effectual to the party making it. It merely confers the right to make the tender. In order, therefore, to ascertain the mode of proceeding in making it, and its effect when made, we must resort to the rules of the common law in similar cases. When a statute confers a right by the use of terms, which have a clear, well settled and fixed meaning in the law, it is a necessary and reasonable inference, in the absence of any express provision, that it was the intention of the legislature to give all the rights and privileges, and attach all the duties and burdens, which the terms used legally import. It is, therefore, a sound and well established rule in the construction of statutes, that when acts are passed upon subjects which relate to legal proceedings, words are to be understood as used in their legal and technical sense, unless it appears by the statute itself that the words were used in a different and more popular sense. *Merchants Bank* v. *Cook*, (4 Pick. 411.) In this statute, the word *tender* is used by itself, without any thing to change or qualify its strict technical signification; we are, therefore,

to suppose that the legislature intended so to use it, and to annex to it all the legal incidents and consequences, which properly attach to the word in legal proceedings. It follows, as a necessary consequence, that when a party avails himself of the right to tender to the party injured a sum for damages under this statute, and thus seeks to secure the benefits conferred by it, he subjects himself to all the consequences which the common law attaches to the act. Of these, none is more clearly established than the rule, that a tender admits the cause of action.

And we think any other construction of the statute would be unreasonable and unjust. If, after making a tender, the defendant was allowed to come into Court and plead to the merits of the action, the plaintiff would be compelled to incur all the expense of making out his case, at the risk, if he failed to recover more than the sum tendered, of paying not only his own costs but those of the defendant, although he should succeed in establishing a good cause of action. Such a result would be at variance with the uniform policy of our statutes, which allow the prevailing party in all cases to recover costs. It would compel a party to pay the costs of proving that part of his case on which he prevails, and also allow the party against whom a good cause of action has been established, to recover costs.

There would be, too, a very great inconsistency in the whole proceeding, if, after a tender, the merits of the whole case were still open to be contested at the trial. The party making the tender, in order to avail himself of it, must bring the money into Court, and when brought in, the plaintiff has a right to take it out on request. (Rules of Supreme Judicial Court, No. 14.) In the event, therefore, of a verdict for the defendants, on the general issue, if the whole merits of the case are open, we should have the strange anomaly of a plaintiff taking money out of Court upon a cause of action, which he had failed to establish on the trial.

It was suggested at the argument, although not strenuously insisted on, that to allow a tender to operate as an admission of the cause of action, would contravene the provisions in ch. 100, § 18 of Revised Statutes, which provides that "Where a defendant shall plead two or more pleas in his defence, no averment, confession, or acknowledgment, contained in any one of such pleas, shall be used or taken as evidence against him on the trial of any issue joined on

any other of the same pleas." It is a sufficient answer to this objection to say, that a tender, under our practice, is not pleaded in defence to the suit, but the money is brought into Court under the common rule, as it is called, and an order or rule of Court is passed, under which the plaintiff proceeds, if he so elect, to the trial of the cause; so that a tender cannot be regarded as within the terms of the statute before cited, it not being a matter to be pleaded in defence to the action. The statute only refers to such averments and confessions as are required to be set out in a plea in defence to the action.

It seems to us, therefore, that the tender made by the defendants, and on which they relied, did admit the cause of action, and that the ruling of the Court below on this point was correct.

We have already stated the extent to which this admission goes. It admits the existence of every fact which the plaintiff would be obliged to prove in order to maintain his action. In the case at bar, therefore, the tender must be taken as an admission of the use of ordinary care by the plaintiff at the time of the accident, because proof of such care is essential to the plaintiff's right of recovery. Ordinary care cannot exist where there is carelessness, and to allow the plaintiff to prove carelessness for any purpose, either upon the merits or in mitigation of damages, would be to permit him to contradict the admission which, by his tender, he had made.

The next objection raised by the exceptions, relates to the admission in evidence of expressions and complaints of pain by the plaintiff, after the accident. The rule of law is now well settled, and it forms an exception to the general rules of evidence, that where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration, that such expressions are the necessary language of suffering or emotion, of the existence of which, from the very nature of the case, there can be no other evidence. There are ills and pains of body which are proper subjects of proof in Courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Any thing in the nature of narration or statement is to be carefully excluded, and the testimony is

to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady. Of course, it will always be for the jury to judge whether such expressions are real or feigned, which can be readily ascertained by the manner and circumstances under which they are proved to have been made. The ruling of the Court below on this point was strictly in conformity with the rules of law, and was properly guarded and limited. (1 Greenl. Ev. § 102); *Aveson* v. *Lord Kinnaird*, (6 East, 188;) *Goodwin* v. *Harrison*, (1 Root, 80;) *Gray* v. *Young*, (1 Harper, 38.) These remarks are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable.

The exceptions are, therefore, overruled, and judgment is to be entered on the verdict for the plaintiff.

Supreme Court of Pennsylvania.

JOHN STEEL, EXECUTOR OF ISAAC STEEL, deceased, *v.* SAMUEL STEEL.

A debt due by an intestate, cannot be set off against one due to his administrator.

Services rendered, goods sold, or money paid for or to a parent by a son, at the request of the former, will, when proven not to have been performed on the basis of father and child, but on that of master and servant, furnish a good cause of action.

The executor or administrator, sued in his representative character for a debt of his decedent, is not prevented from pleading the Statute of Limitations by any acknowledgment he may have made of the debt, whether such acknowledgment were made before or after the debt was barred by the statute.

ERROR to the Common Pleas of Clarion County.

This was an action brought by Samuel Steel, plaintiff, against John Steel, executor of Isaac Steel, deceased, for services rendered, goods sold, and money paid for the use of the decedent, after plaintiff became of age. Defendant pleaded *non assumpsit et non assumpsit infra sex annos.*

Plaintiff proved that he was a son of decedent, and dwelt with his family, on a farm of his own, within a mile of that of decedent. Plaintiff and his children had often worked for decedent at harvest and other times; kept horses, paid some small debts for him, and sold him some things. Decedent died in 1841, and his goods were sold in March, 1844, when plaintiff bought $51 worth of goods,

and produced his own bill against his father's estate, asking the executor to give him a credit thereon for what he had bought. Executor promised to settle the plaintiff's account, but declined giving the credit asked for.

The defendant gave in evidence the proceedings before a justice of the peace, in a suit brought by him in 1847, for the amount of the goods purchased by plaintiff at the sale. In this suit plaintiff offered, as a set-off, a part of his claim against decedent's estate, amounting to $100, but the justice decided for the executor, (the plaintiff before him.)

As rebutting evidence to the statement, that his claim had been used as a set-off, plaintiff produced testimony to prove that his set-off, though offered before the justice, had been withdrawn by him. The verdict in the Common Pleas was for the plaintiff there, who is the defendant in error. To the charge of McCalmont, Presiding Judge of the Common Pleas, the following errors were assigned.

1. The Court erred in charging the jury, that if they believed the evidence as to what passed at the sale, in 1844, the plaintiff's claim was not barred by the Statute of Limitations.

2. In charging the jury that the proceedings before the justice was not a bar, though it appeared by the transcript of his judgment that the claim was before him as a set-off, but not allowed.

3. In not charging the jury that the plaintiff could not recover, unless it appeared, upon plain and unequivocal proof, that the relation of parent and child was changed to that of master and servant.

The opinion of this Court was delivered by

Rogers, J. Had this been a claim for services rendered without request by a son, while residing in the same house with his father and a member of his family, as in *Candor's case*, (5 Watts & Serg. 513,) the action could not be maintained. But here the services were performed, if we believe the witnesses, at the request of the father, by a son who lived at a distance from him, on a separate property, with a family of his own to support. The facts of the case furnish abundant proof, that the peculiar relation of parent and child for that purpose had ceased, and that the parties contracted together on the basis of master and servant.

There is nothing in the second error. The justice of the peace acted correctly in refusing to allow a set-off, the demand not being in the same right. It was an action by

an administrator on a promissory note, given by the defendant to him for a purchase made at the vendue, and, consequently, not subject to a set-off by a debt due by the intestate to him. Besides, it appears in evidence that the set-off was withdrawn. But *Wolfersberger* v. *Bucher*, (10 Serg. & Rawle, 10,) rules this point.

The remaining error, on the Statute of Limitations, has something more respectable in it. The acknowledgment, by which it is sought to take the case out of the operation of the statute, was made by the administrator and not by the intestate. And in *Fritz* v. *Thomas*, (1 Wharton, 66,) it is ruled that an executor or administrator, sued in his representative character for a debt due by decedent, may plead the Statute of Limitations as a bar to the action; although such executor or administrator may have made such an acknowledgment of the debt, as in the case of a person sued for his own debt would be sufficient to take the case out of the statute. *Fritz* v. *Thomas*, which restores the legitimate construction of the statute and places it on its true ground, seems to rule this case; but the plaintiff contends that it does not apply, because there the promise was not made till after the bar of the statute, and here it was made before the debt was barred. He contends it would be a fraud on the plaintiff to insist on the statute; and, moreover, would be prejudicial to the estates of decedents, because it would compel creditors to bring suit, to prevent the running of the statute. I confess I was struck with the reason given for the attempted distinction, but on reflection, I am satisfied that no such distinction exists. The reasoning of the Chief Justice, in *Fritz* v. *Thomas*, applies with equal force to both cases; and I am at all times averse to mere technical distinctions, where they can be avoided. The more simple and plain the law of contracts is, the better is it for the great body of the people, because they can more easily understand it as a rule of action. Nor does the rule necessarily lead to the consequence apprehended. An administrator may, notwithstanding, make such an arrangement, if beneficial to the estate, for, it must be observed, he is not bound to plead the statute. This is a matter resting entirely with himself. Nor will the creditor be prejudiced from delaying suit upon the promise or acknowledgment of the administrator, because the latter would render himself personally liable for the debt at the suit of the creditor. The case of

Patton's Administrator v. *Ash*, (7 Serg. & Rawle, 116,) has no bearing on this question. That was a case of a promise or acknowledgment by intestate himself, and not by his administrator.

Judgment reversed, and *venire de novo* awarded.

Abstracts of Recent English Decisions.

[From Vol. XV. London Jurist.]

Court of Chancery.

Evidence — Privileged Communication — Partnership. A trading company, having become embarrassed, appointed three of its members, A., B. and C., to act as a committee for the shareholders in winding up its affairs, and they were empowered to send out agents to India for that purpose; and they were empowered by the directors to manage and arrange the affairs of the company. They appointed D. and E. agents to go to India. The plaintiffs brought several actions on certain debentures against A., B., and C., as shareholders. A., B. and C. filed a bill for an injunction, and to have the debentures delivered up. The present plaintiffs then filed a bill against A., B. and C. for discovery. A., B , and C., in their answers, admitted the possession of certain documents, consisting of communications which passed between them and the directors, the secretary of the company, and the agents in India, and which were alleged to be confidential communications after the matters in question in this suit had arisen, and in contemplation of or pending proceedings in respect of various matters, and in particular of the claims of the plaintiffs, and for the purpose of communicating to the persons to whom they were addressed, the proceedings adopted in respect of such claims, and the opinions of the legal advisers consulted by the defendants, or for the purpose of being submitted to such legal advisers and the shareholders; and they claimed protection from production: — *Held*,

First — overruling the objection that the defendants had the possession of the documents only as the agents of the directors and shareholders, and that they were not parties to the suit, and were not willing that the documents should be produced, that the defendants sufficiently represent the whole of the partners or shareholders for all the purposes of the suit.

Secondly — affirming the order of Knight Bruce, V. C., for production, that the documents were not privileged, with the exception of such parts thereof as contained the opinions of the legal advisers, it being no ground of privilege that they relate to the matters in dispute, and arose out of communications between the parties themselves, with a view to their defence in the suit. — *Glyn* v. *Caulfield*. 807.

Husband and Wife — Joint Solicitor — Privilege. A husband was desirous of selling an estate which was charged with his wife's jointure. The wife, who was then living with her husband, agreed, at his request, and upon the advice of his solicitor and counsel, to release her jointure upon certain terms. The wife subsequently filed her bill against her husband and the solicitor to enforce the terms, and to compel production of the cases and opinions, &c. submitted and taken in relation to the transaction. Both the husband and the solicitor, in their answers, admitted that the plaintiff

had no separate solicitor or counsel, and that she entered into the arrangement for the release of her jointure, and executed the deed of release, under the advice of the solicitor and counsel of the husband, without having any other legal advice; but submitted, that the documents in question were privileged. Upon motion for production — *held*, reversing the decision of Lord Cranworth, V. C., that, upon the facts, the solicitor must be taken to have acted as the joint solicitor of both husband and wife; and that the documents must be produced. — *Warde* v. *Warde*. 759.

Semble, wherever husband and wife have distinct interests, and the wife is induced, in dealing with those interests, to act under the advice of an attorney employed and paid by the husband, the attorney ought to be deemed to act as the attorney of both husband and wife. — *Ib.*

Rolls Court.

Before Sir John Romilly, M. R.

Impertinence. The defendants, in their third further examination before the master, annexed five schedules to their examination, in which a large mass of matter set forth in their previous examinations was repeated. *Held*, that the repetitions were impertinent; and it was referred to the master to expunge them. — *Allfrey* v. *Allfrey*. 831.

Will, Construction of. A testator, by a codicil to his will, gave legacies of 500*l*. each to four children, by name, of his niece, Alice Early, the eldest daughter of his brother Henry, and he directed his executors to pay, out of his personal estate, the sum of 500*l*. a-piece to each child that might be born to either of the children of either of his brothers, to be paid to each of them on his or her attaining the age of twenty-one years. The testator's niece, Alice Early, besides the four children named in the codicil, had three other children living at the date hereof. *Held*, that those children were not entitled to a legacy of 500*l*. each, as the words of the codicil contemplated only children who might be born subsequently to the date of it. — *Early* v. *Middleton*. 867.

Vice-Chancellor Knight Bruce's Court.

Legal Representatives — Construction. The words "legal representatives," used in a deed, cannot be acted upon by the Court, unless some context be found in the deed to explain them. — *Tipping* v. *Howard*. 911.

Guardian — Infant. The Court will not appoint a mother to be the guardian of her children, without having some information as to the family of the father. — *In re Cook*. 836.

An infant may apply for the appointment of a guardian, without a next friend. *Ex parte Craig*. 762.

Scandal — Exceptions to Answers. To a bill filed to enforce an alleged title to real and personal property, the defendant, in his answer, said, "The plaintiff is desirous of annoying and harassing the defendant, to extort money from him." "The plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being harassed by the vexatious and illegal conduct of the plaintiff." The plaintiff took exceptions to these passages for scandal, but the exceptions were overruled.[1] — *Stanton* v. *Holmes*. 763.

[1] Vice-Chancellor. — The wonder that any one should have thought it worth while to insert such charges in an answer, is only equalled by the wonder that any

Trustee — Breach of Trust. Trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest at 5*l.* per cent., the accounts to be taken with rests. — *Hutchins* v. *Hutchins.* 869.

Will — Construction — Misdescription of Sex. Three sons and a daughter, the only children of A. B., who were living at the date of the will, and at the death of the testator, held entitled to legacies bequeathed to the four sons of A. B. — *Lane* v. *Green* 763.

Will — Construction — "Personal Representative" — "Next of Kin." A testatrix gave personal estate to her sister for life, for her separate use, with remainder over among her nieces, with remainder, in case of the nieces dying without having had any child, "to the personal representatives or next of kin" of the testatrix's father. *Held*, that the next of kin at the death of the testatrix were the persons entitled. — *Philps* v. *Evans.* 809.

Will — Construction. A testator gave his residuary estate upon trust, after his wife's death, to apply the income for the benefit of his son, a person of weak intellect. The testator died in 1815, and his son was found lunatic in 1818. The widow gave the residue of her personal estate upon trusts for the maintenance of the lunatic, and directed the surplus to be invested. She died in 1832. Orders were made in the lunacy, making an allowance for the support of the lunatic. The income of the two estates exceeded the amount of the allowance, but the income of the mother's estate alone was less than that amount. *Held*, that the whole income of the mother's estate was to be first applied for the maintenance of the lunatic, in exoneration of the income of the father's estate. — *Methold* v. *Turner.* 810.

Will — Construction — Uncertainty. Under an extremely obscurely worded will, the real estate was held to have descended, and the personal estate to be applied as if he had died intestate. — *Jackson* v. *Craig.* 811.

Will — Construction — Dying without leaving Issue. A residuary real and personal estate was devised and bequeathed by will, in certain shares, to legatees by name, and there was a direction that the whole of the legatees should have the benefit of survivorship between them, in the event of any one or more of them dying without leaving issue. *Held*, that the "dying without leaving issue" did not mean dying in the lifetime of the testator without leaving issue. — *Smith* v. *Stewart.* 834.

Will — Construction — Power of Sale in Trustees. A testator devised the residue of his estate and effects, real and personal, copyhold and leasehold, to three persons, their heirs, executors, and administrators, upon

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one should have thought it worth while to take exceptions to them for scandal. However, here they are, and they must be dealt with. The first exception is to this passage — "That the plaintiff was desirous, by annoying and harassing the defendant, to extort money from him." Now I suppose that, if the defendant were to prove that the plaintiff had said, "I am desirous of annoying and harassing the defendant to extort money," such evidence may be allowed to have some materiality in the question of costs. But if this charge had not been contained in the answer, such a proof of it would not have been admissible. Although there it is as nearly immaterial as any thing can be which is not wholly immaterial, I do not think it entirely immaterial. The same observation applies to the other charge. The defendant may, under this allegation, prove that the plaintiff had said, "I am acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being put to expense by my conduct, which I admit is illegal and vexatious." Although this is all but nonsense on both sides, my impression is that the exceptions ought not to be allowed. One is almost ashamed of giving any thing that has the semblance of reasoning on this subject. As to costs, I say nothing.

trusts, and authorized and empowered them, and the survivors and survivor of them, his heirs, executors, or administrators, to sell all or any part of his said property, and the purchasers should not be bound to see to the application of the purchase-money, nor be answerable for the misapplication thereof. Two of the trustees died. The survivor, by his will, devised his trust estates to A. and B. and their heirs, and appointed them his executors. A. and B. contracted to sell part of the copyhold estate of the testator, but the purchaser objected to complete, on the ground that the vendors could not make a title. On a special case, the Court held the point to be too doubtful to force the title on a purchaser. — *Wilson* v. *Bennett*. 912.

Will — Codicil — Revocation. A testator, by his will, devised his real estates to A. and B. in fee, on certain trusts, and by a codicil appointed C. "to be a trustee and executor of his will in the place of B., whom he did not wish to act as executor." *Held*, that the codicil was a revocation of the devise made to B. by the will. — *In re Hough's Estate*. 943.

Vice-Chancellor Lord Cranworth's Court.

Will — Conversion — Condition. A testator gave freeholds and leaseholds to trustees, upon trust to pay the income to C. for life, or at their discretion to invest it, with remainder to his children, and in default of children, on trust to sell, and divide the produce in manner afterwards directed. He made similar gifts for the benefit of his other children and their issue, and directed the trustees to divide the produce in sixths, and apply one sixth to the purchase of an annuity to C. C. died without children, and the trustees sold. *Held*, that the one sixth of the product of the sale was undisposed of, and went to the next of kin of the testator. — *Walters* v. *Corpe*. 764.

Vice-Chancellor Turner's Court.

Injunction — Secret of Compounding Medicines. — A party was restrained from using the secret of compounding a medicine not protected by patent, it appearing that the secret was imparted to him, to his knowledge, in breach of faith or contract. — *Morison* v. *Moat*. 787.

In June, 1823, Morison, the sole inventor and proprietor of a medicine not protected by patent, upon the occasion of entering into partnership with Moat as manufacturers and venders of the medicine, for the purposes of the partnership communicated to the latter the secret of compounding the medicine. By the partnership deed either partner was empowered to introduce another partner, by deed, to be attested by the other; and by mutual bonds of even date, Morison bound himself not to communicate the secret of compounding the medicine to any person, except a partner so introduced; whilst Moat bound himself not to communicate such secret to any person whomsoever. Morison afterwards introduced his sons, the plaintiffs, into the partnership; and Moat, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son; and then by deed, duly attested by Morison, appointed the defendant his successor in the partnership. Shortly after the death of Moat, the defendant joined Morison and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in executing a partnership deed, containing a clause declaring the defendant a sleeping partner, and another clause, by which the partners covenanted not to divulge the secret of compounding the

medicines to any person whomsoever. The defendant also afterwards executed deeds reciting that the sole property in the secret was in Morison. Morison afterwards died, having by will bequeathed his property in the secret to the plaintiffs. After the determination of the partnership the defendant made use of his knowledge of the secret, communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by Morison. Upon the application of the plaintiffs, the Court granted an injunction restraining the defendant from selling, under the title or designation of "Morison's Medicine," any medicine manufactured by the defendant; and also from compounding any medicines according to the secret mentioned in the plaintiffs' bill, and from in any way making use of such secret. — *Ib.*

Court of Queen's Bench.

Assumpsit — Release — Fraud. Declaration contained a count in assumpsit for goods sold and delivered. Plea, a release after the accruing of the cause of action. Replication, that the release was obtained from plaintiff by the fraud, covin, and misrepresentation of defendants, and others in collusion with them. Rejoinder traversed the replication. It appeared that defendants, being indebted to several persons, and amongst others to plaintiff, whose debt amounted to 989*l.* 7*s.*, proposed a composition of 6*s.* 8*d.* in the pound, which was agreed to by the majority of the creditors in number; but plaintiff, who was not present when the 6*s.* 8*d.* was agreed to at a meeting of creditors, refused to concur, unless he was paid 13*s.* 4*d.* in the pound upon part of the debt, and the other part was paid in full. Upon receiving notes for the full amount agreed upon, and the positive assurance of defendants that no other creditor than himself was preferred, and that no one of them was to have a farthing beyond the 6*s.* 8*d.*, he signed a release for his whole debt. The assurance of defendants that no other creditor was preferred was untrue.

Held, by Wightman, J., that upon this issue it was no answer to the action to show that plaintiff had contracted for a preference in fraud of the other creditors; and that defendants could not be allowed to set up a counter fraud by them and plaintiff, by which they colluded to deceive other persons, as an answer to a charge of fraud practised by defendants upon plaintiff, which would have the effect of depriving him of part of his original just right. — And

Held, by Coleridge and Erle, JJ., that the stipulation by plaintiff for a preference, being a fraud upon the other creditors, was void, and no part of it could be legally relied on by him as forming a material inducement for the deed; and that the replication was not supported by showing that plaintiff was deceived by the misrepresentation of defendants that no other creditor should have a preference, and that he would not have executed the deed if he had not been so deceived. — *Mallalieu* v. *Hodgson et al.* 817.

Declaration contained also counts upon three several promissory notes. Plea, that defendants were indebted to plaintiff in 989*l.* 7*s.*, and had accepted four bills of exchange for the amount, drawn by plaintiff, and payable to his order; that defendants compounded with their creditors, and that plaintiff agreed to the composition, receiving a preference beyond the other creditors, and executed a release of his debt; that it was his duty to take up the four bills of exchange, but that he neglected to do so, and the holders of the bills threatened to sue defendants, who, in order to induce plaintiff to take them up, gave him the promissory notes in the counts mentioned; and that there was no other consideration for the giving of the

notes. Replication, *de injuriâ absque tali causâ*. *Held*, that the fraudulent preference of plaintiff did not make the composition void as against him; and consequently that there was no sufficient consideration for giving the notes, as plaintiff ought to have protected defendants from the consequences of liability upon the bills. — *Ib.*

Contract — Execution. When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. — *Cort et al.* v. *The Ambergate Railway Co.* 877.

Declaration in covenant upon a contract under seal for railway chairs to be supplied by plaintiffs to defendants, an incorporated railway company, at certain times and in certain quantities, to be paid for after delivery. Averment, that plaintiffs were ready and willing to execute and perform the contract according to the conditions and stipulations; and that defendants had accepted and received a certain quantity of the chairs. Breach, that defendants refused to accept and receive the residue, and prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract. It appeared that plaintiffs would have gone on regularly making and delivering the chairs according to the contract, if they had not received a notice from defendants that they did not wish to have any more chairs, and would not accept any more. After receiving that notice, plaintiffs ceased to make any more: *held*, that plaintiffs were entitled to a verdict on a plea traversing the allegation, that they were ready and willing to execute and perform the contract, although they never made and tendered the residue of the chairs. — *Ib.*

Held, also, that plaintiffs were entitled to a verdict on a plea traversing that defendants refused to accept or receive the residue of the chairs, and that they prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract; because, first, the material part of the allegation was, that defendants refused to receive the residue of the chairs; and, secondly, assuming that the whole must be proved, plaintiffs might be prevented from completing the contract otherwise than by positive physical force, and defendants, though a corporation, might discharge plaintiffs from the performance of the contract otherwise than by instrument under seal. — *Ib.*

Held, also, that in estimating the damages, the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which defendants refused to accept. — *Ib.*

Contract — Memorandum in Writing — Statute of Frauds. By Lord Campbell, C. J., Patteson and Wightman, JJ. Where there is an entry of the contract between buyer and seller, by a broker acting for both parties, in his book, signed by him, that entry is the binding contract between the parties, and a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, will not affect its validity. — *Sweeting* v. *Archibald.* 947.

Also, where the broker omits to enter and sign any contract in his book, and sends bought and sold notes to the buyer and seller respectively, if these agree, they constitute a binding contract; but if there be any material variance between them, they are both nullities, and there is no binding contract. — *Ib.*

And by Patteson, J. — There is in that case no note or memorandum in writing of the bargain to satisfy the 17th Section of the Statute of Frauds.

By Erle, J. — The mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree. — *Ib.*

Declaration, setting out a sold note of "500 tons Messrs. Dunlop's pig iron," signed by a broker, stated an agreement by defendant to purchase, and a breach of that agreement by not accepting the same. Plea, *non assumpsit*. It appeared that the broker agreed with defendant that he was to be the purchaser of 500 tons of Dunlop's iron, and that their iron was Scotch; that the broker delivered to defendant a bought note, in which the iron bought was named Scotch iron, and to plaintiff a sold note, in which the iron sold was named Dunlop's iron. Upon an objection that there was no binding contract, because there was a material variance between the bought and sold notes, the judge allowed the declaration to be amended according to the terms of the bought note. Evidence was then given that defendant, after the day on which he ought to have performed the contract, authorized the broker to treat with plaintiff for a compromise, but without referring to the terms either of the bought or the sold note. — *Held*, that the amendment in the declaration was properly made. — *Ib.*

Held also, by Lord Campbell, C. J., Patteson and Wightman, JJ., that there being a material variance between the bought and sold notes, they did not constitute a binding contract; and that if there were a parol agreement, there being no sufficient memorandum of it in writing, the Statute of Frauds had not been complied with; and by Lord Campbell, C. J., and Wightman, J., that there was not sufficient evidence of the defendant having ratified the contract sent to him contained in the bought note. — *Ib.*

But, by Erle, J., that there was sufficient evidence to warrant the jury in inferring that the substance of the contract was as alleged in the amended declaration, and as expressed in the bought note; and therefore either that note alone would be a sufficient memorandum of the bargain, signed by an agent, within the Statute of Frauds, or, if both notes were essential to the plaintiff's case, they did not substantially vary. — *Ib.*

Sale. Conditions of sale, after stating that the estate was by settlement limited to Mrs. C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows: — "And there being three such children only, all of whom have attained the age of twenty-one, such children or their trustees shall, if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. C." Two of the children of Mrs. C. were married women, having children, who were minors, and they had settled their portion of the money to arise from the sale of the estate in trust for themselves for life, with remainder to their children. *Held*, that neither the children of Mrs. C. nor the trustees had legal capacity to join in a conveyance, and therefore a purchaser was entitled to recover the deposit. — *Moseley* v. *Hide et al.* 899.

Will — Alteration — Evidence. The presumption is, that an alteration apparent on the face of a will, was made after the will was executed. Therefore the party who seeks to derive an advantage from such an alteration must adduce some evidence, from which the jury may infer that the alteration was made before the will was executed. And evidence of previous declarations by the testator, that he intended to dispose of his property in the manner in which it is disposed of by the will in its altered form, is receivable. — *Shallcross* v. *Palmer et ux.* 836.

In ejectment by heir at law against devisee, declarations by the testator, before the execution of the will, that he intended to make provision by his will for the defendant, coupled with the fact, that without the alteration in question, the will, which disposed of the whole of his property, real

and personal, made no provision for him, are admissible to rebut the presumption that the alteration was made after the will was executed. — *Ib.*

So held in the case of a holograph will, where the obliterated words showed that the premises in question had, at the first writing of the clause in the will, been limited to the lessor of the plaintiff in fee, and the words interlineated substituted a life estate to him for the estate in fee, and gave the remainder in fee to the defendant. — *Ib.*

Court of Common Pleas.

Bill of Exchange — Parol Agreement. Assumpsit by the indorsee of a bill of exchange against the acceptor. Plea, to the further maintenance of the action, that, at the time of accepting, the defendant was indebted to the drawer in 65*l.*, and it was agreed between them that the defendant should pay the drawer the said sum by four instalments, and, to secure the due payment thereof, should accept the said bill; that the bill was accepted in pursuance of the agreement, and, save as aforesaid, there was no consideration; that the drawer indorsed the bill to the plaintiff without consideration, and to hold it as his agent; that before action, the defendant paid the drawer the three first instalments, in satisfaction of such instalments, and after action, and upon the day agreed upon, paid the fourth, in pursuance of the agreement. *Held*, a non-issuable plea, as the promise in the bill could not be varied by a parol contract. — *Besant* v. *Cross*. 828.

Libel — Justification — Acquittal no Estoppel. In an action for a libel charging a person with a legal crime, *e. g.*, murder, with circumstances of aggravation, if the additional circumstances would be in themselves libellous, they must be justified, as well as the bare legal offence. — *Helsham* v. *Blackwood et al.* 861.

Declaration set out a libel, alleging that the plaintiff had shot one C. in a duel, and that, on his trial, it was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz. that he had spent nearly all the previous night in pistol practice. Plea, that the plaintiff had murdered the said C. by shooting him. Replication, by way of estoppel, that the plaintiff was acquitted on his trial. *Held*, that the plea was bad as an insufficient justification. — *Ib.*

Semble, that the replication was also bad, the trial and acquittal being no estoppel on the defendants. — *Ib.*

Limitations, Statute of — Acknowledgment of Debt. The defendant wrote to the plaintiff — "I am much surprised at receiving a letter from H. K." (an attorney) "for the recovery of your debt. I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed, when F. was in town." *Held*, an insufficient acknowledgment to bar the Statute of Limitations. — *Cawley* v. *Furnell, et al.*. 908.

Sheriff, Action against, for Escape — Measure of Damages. In an action on the case by an execution creditor, against the sheriff, for the escape of his debtor, the measure of damages is the value of the custody of the debtor at the moment of the escape; and no deduction ought to be made on account of any thing that the creditor might have obtained by diligence in retaking the debtor after the escape. — *Arden* v. *Goodacre.* 776.

Court of Exchequer.

Contracts with Public Companies. Persons dealing with railway or other similar companies should always bear in mind that such companies

are essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials; and should insist upon all contracts with them being by deed under the seal of the company, or signed by directors, or otherwise executed in the manner prescribed by the act of Parliament regulating the company — there is no safety or security for any one dealing with such a body upon any other footing. The same observation also applies in respect of any variation or alteration in a contract which has been made. The secretary of such a company has of himself no independent authority to bind the company by letters or documents signed by him. — *Williams* v. *The Chester, &c. Railway Company.* 828.

Distress — Notice — Abandonment. A distress for rent having been made at some livery stables, goods belonging to several strangers, and among others, a pony phaeton of A. B., were taken under it. A notice of distress was left on the premises, the inventory attached to which, after specifying certain goods, but making no mention of those of A. B., proceeded thus — "And all other goods, chattels, and effects on the said premises that may be required in order to satisfy the above rent, together with all the expenses." *Held*, that this notice was too vague to justify a sale of the property of A. B. — *Kerby* v. *Harding.* 953.

After the above distress was made, the distrainer permitted A. B. to use the pony phaeton, who after using it, and without notice of the distress, brought it back again. *Held*, that this was no abandonment of the distress. — *Ib.*

Court of Admiralty.

Collision — Estoppel — Re-arrest of Ship, after giving Bail, not permitted. An American ship was arrested, and bailed in a cause of collision promoted by the owners of the ship and cargo damaged, and the damage pronounced for. A claim for damage to the cargo was preferred before the registrar and merchants. Subsequently it was ascertained that the damage to the cargo was to a greater extent, and they arrested the ship in a fresh action: *held*, that the action could not be maintained, the parties and cause of action being the same. — *The Kalamazoo.* 885.

Abstracts of Recent American Decisions.

Cases decided in the Supreme Court of Pennsylvania.

Real Estate, Parol Title to — Statute of Frauds. To constitute a good title by parol to real estate, it must be clearly proved that the possession was contemporaneous with or immediately consequent on the contract, and in pursuance of its terms. — *Atkins' Heirs* v. *Young.*

Possession of land before and at the time of the supposed parol contract, and the mere continuance of that possession, cannot be considered as taking possession under it. — *Ib.*

The Statute of Limitations binds the remainder-man whose estate has been created since it began to run, even though he may never have had a right to enter. — *Ib.*

To take the case of possession under a supposed parol contract out of

the Statute of Frauds, the possession must be notorious and exclusive, and in pursuance of the contract. — *Ib.*

Will — Contract — Practice. When a party permits his adversary to read a deposition in evidence, and omit certain portions of it, he will not be suffered in his own turn to read the omitted parts for the sole purpose of contradicting the testimony of other evidence. — *Logan* v. *M'Ginnis.*

The subscribing witnesses to a will may testify their opinion of testator's sanity; it is not necessary that they should state the facts whereon they ground their opinion. Other witnesses, however, as to testator's sanity, must speak of particular facts. — *Ib.*

The Supreme Court will not permit an assignment of error to be defeated by a mere want of formality; but will, if necessary, allow the party to amend. — *Ib.*

A contract, executory or otherwise, to convey all testator's property by will, for a sufficient consideration, such as support, &c. for the remainder of his life, is contrary to no known rule of policy, even in the case of an aged person. — *Ib.*

And were testator in such a case to fail to make such a will as he had contracted to do, equity would decree a conveyance, or a jury would give damages to the amount of the value of the property. — *Ib.*

Township Officers. A warrant on a township treasurer, signed *by* one supervisor and *for* the other, is admissible in evidence; the questions of authority to sign for the second supervisor (who in this case could not write) being for the jury. — *Pitt Township* v. *Leech.*

Orders by county or township supervisors on their respective treasurers, should not be sued on without a previous demand for payment. But when a county or township neglects to pay either principal or interest of its debt, the Supreme Court will not reverse a judgment against it, for want of demand of payment before suit brought, unless such point is strictly in issue. — *Ib.*

Dower, Devise in lieu of. By statute of 8th of April, 1833, § 11, it is enacted, — "That a devise or bequest by a husband to his wife of any portion of his estate or property, shall be deemed and taken to be in lieu and bar of her dower in the estate of such testator, in like manner as if it were so expressed in the will, unless such testator shall in his will declare otherwise; provided, that nothing herein contained shall deprive a widow of her choice either of dower or of the estate or property so devised and bequeathed." *Held*, that a widow's acceptance of a devise to her in her husband's will, does not bar her claim for dower in lands aliened by her husband, she not joining in the conveyance. — *Borland* v. *Nicholls.*

Nor will a covenant of warranty in the conveyance by the husband affect her claim for dower in such a case; the remedy lies over against the heirs. — *Ib.*

Supreme Judicial Court of Massachusetts for Suffolk County, November Term, 1851.

Deed for Charitable Purposes — Construction — Trust Estate. A. in 1777, conveyed to B. and C., without words of limitation, a piece of real estate, to have and to hold, to them and the survivor of them in trust, to and for the use of St. Andrew's Lodge. Demandant claimed the premises as held of A., who died in 1785. The tenants claimed the premises as trustees of the St. Andrew's Lodge, and the successors of the grantees of A. *Held*, that as the words of A. showed strongly and clearly an intent to convey the whole estate for the benefit of St. Andrew's Lodge, and, as

the nature of the trust estate in question required an estate in fee to support it, — that, though there are no words of limitation in the deed, yet the estate passed to the grantees for charitable purposes, and the deed will be construed as giving them an estate in fee. See *Tucker* v. *Seaman's Aid Society*, (7 Met. 188); *Gould* v. *Lamb*, (11 Ib. 84); and *Cleaveland* v. *Hallett*, decided in Norfolk county, 1850, and not yet reported. [This was the case of a deed of trust with no words of limitation, but where the trust required an estate in fee to support it, and the Court gave it that construction.] — *King* v. *Parker et al.*

Executor and Administrator — Assets — Liability of Sureties on Probate Bond. This was an action on probate bond against defendant and his sureties, as executor of one Hewes, for not accounting, &c. On verdict for the plaintiff, reference was made to a Master to report sums due the estate, and not accounted for. One sum of $5000, and one of $250 were allowed by the master, and to this objection was made. Hewes had given a bond to one Wheeler to convey certain real estate upon the payment of $5000 within a specified time. Hewes executed and acknowledged a deed of the land, but died before it was delivered, and before the time of payment of the money. Wheeler paid the defendant the $5000, within the time, and took the deed. It was contended that the deed passed no title to Wheeler; that the land and not the money belonged to the estate. *Held*, without settling whether the deed was delivered as an *escrow*, that, as the executor received the money on a personal obligation belonging to the estate, he was bound to account to the estate therefor.

The sum of $250 was paid to defendant as executor of Hewes, according to a vote of the City Council of Boston, as a full quarter's salary of the testator as superintendent of burials, he having died early in the quarter. It was argued, that this sum being a gratuity from the city, was not assets for which sureties should be liable, but the contrary was held by the Court. — *Loring, Judge of Probate*, v. *Cunningham et al.*

Lease, Construction of — Covenant broken. Defendant, March 12, 1845, leased to the plaintiff, for five years, with the usual covenants of quiet use and enjoyment, Atkins's Wharf, with certain bounds, and described as "being the same premises now in the occupancy of B. Abrahams & Co., together with all the rights, privileges, and appurtenances to said wharf and to the flats belonging thereto, or in any ways appertaining." During the possession of B. Abrahams & Co., and for one year after the execution of the lease, the dock on the southerly side of Atkins's Wharf was wide enough to receive two vessels abreast. By virtue of an agreement made in 1808, and placed on record, between the then owners of the contiguous wharves, the proprietors of Bartlett's Wharf, which was next south of Atkins's Wharf, in 1846, filled up the space between Bartlett's and Atkins's Wharf, so that the dock to be occupied jointly by the owners of the two wharves was reduced to the width of twenty-five feet; and for this eviction from the portion of the dock filled up, the plaintiff brought his action. *Held*, that the case turned wholly on the construction of the lease which was solely for the Court; that the reference to Abrahams & Co. was solely to identify the wharf; that only such flats, docks, and privileges as rightly belonged to the wharf were secured to the lessee by the lease; and that, as it appeared from the records that the proprietors of Bartlett's Wharf might rightfully reduce the width of the dock as they had done, the lessee got all the lessor undertook to give, and has no cause of action. — *Davis et al.* v. *Atkins et al.*

Lease of Real Estate, no Warranty thereby implied by law — Evidence. Defendant being the owner, in April, 1849, leased to plaintiff a store which they filled with goods. In June, 1849, the roof and walls of the store fell in, and buried plaintiff's goods in the ruins, and to recover the price of

these goods the plaintiffs brought their action. The lease of the plaintiffs, or the agreement in writing which amounted to a lease, stated the length of the tenancy, the rent, conditions as to repairs, &c., but contained no express warranty that the building was fit for a dry goods' warehouse, or for any other purpose. Plaintiffs disclaimed any imputation of fraud or misrepresentation on the part of defendant. *Held*, that the lease contained no express warranty, and that there is no warranty implied in law on the part of the lessor of real estate, that it is fit or suitable for the purposes for which it is leased or occupied; and that decisions in reference to leases of furnished lodgings, and to warranties implied upon the sale of goods, were not applicable to this case. — *Dutton et al.* v. *Gerrish.*

Plaintiffs offered to prove that before they hired the store, they asked defendant if it was strong and safe, and he replied, "He would warrant it to stand, if filled with pig lead;" but *held*, that this parol evidence was not admissible to explain the written contract. — *Ib.*

Statute of Frauds — Extension of Contract within, proved by Parol. Assumpsit on money counts and a special count on this written agreement: "Mr. James Stearns, Sir, I will sell you the house No. 42 Myrtle Street, on the first day of October next, if you will pay me what it has or may cost me, and my charges for the same. Adin Hall. Boston, May 20, 1843." The agreement was given under the following circumstances. Plaintiff had become embarrassed, and was committed to jail. To enable defendant to assist him, he gave defendant an absolute deed of the estate in Myrtle Street, with the express understanding that it should be reconveyed, and afterwards the above writing was given by defendant to plaintiff. A week before the first of October the plaintiff employed a broker to sell the estate. The broker went to defendant, and was told by him that he should have thirty days after the first of October to do the business in. Within these thirty days defendant's expenses and charges were tendered him, but he refused to convey. At the trial defendant contended that the contract was within the Statute of Frauds, and could not be varied by parol; but it was *held*, that the parol evidence was admissible; that the Statute of Frauds applies to the original contract, and not to its performance; that the admissibility of parol evidence to vary the performance of contracts within the statute stands precisely on the same grounds as it does to simple contracts without the statute, and that no more injury could result from the admission of parol evidence to show the extension of the time allowed for the performance of the contract, than from its admission to prove its performance at the time agreed by the contract. See *Cummings* v. *Arnold*, (3 Met. 486); *Cuff* v. *Penn*, (1 M. & S. 21.) — *Stearns* v. *Hall.*

Trover — Title to Personal Property. Trover to recover the value of certain articles of furniture. There was evidence at the trial, that the articles were purchased by the plaintiff, and that they subsequently came into the possession of the defendant, but under what contract or circumstances did not appear. The defendant, when the goods were demanded of him, refused to deliver them, claiming them as his own; and this was the alleged conversion. *Held*, that the presumption of ownership of the goods in defendant arising from his mere possession of them, was rebutted by the proof of prior ownership on the part of the plaintiff, and that trover would lie. See case put in 1 Strange, 535. — *Magee* v. *Scott.*

[Decisions under the new Practice Act of Massachusetts.]

Court of Common Pleas, Worcester, December Term, 1851.

Before Judge MERRICK.

Interrogatories to Parties — Irrelevant Answers. This was a real action

to recover possession of lands conveyed in mortgage to the plaintiff The defendant pleaded the general issue, and filed, as a specification of defence, that no payment had been made of any part of the debt secured by the mortgage within twenty years before the commencement of the action, and no acknowledgment had been made within that time that the debt was due.

The plaintiff filed in the clerk's office interrogatories to be answered by the defendant. Among the interrogatories filed was the following: "Have you not within twenty years next before the commencement of the action paid any part of the debt secured by the mortgage? You are not inquired of how much you paid; you are not desired to state how much, but only whether you have paid any part of the debt." The defendant answered, "Yes, I have. I have paid the whole, and will state, if desired, the time when, and the particular circumstances relating thereto." The plaintiff moved that all that part of the answer after the words "Yes, I have" be expunged as irrelevant, and cited *Hand* v. *Hughes*, (4 Law Reporter, 393); and *Higbee* v. *Bacon*, (8 Pick. 484.)

But it was held that the circumstances differed from those in *Hand* v. *Hughes*, — that the part of the answer sought to be expunged was within the meaning of the statute, explanatory of the admission made by the defendant, and relevant to the interrogatory proposed to him. And the motion to expunge was accordingly denied. — *Claflin* v. *Corbett*.

Amendment — Jurisdiction. This action was commenced subsequent to the time when the 233d chapter of the statutes of 1851 took effect. It was returnable into the Court of Common Pleas for this county, and the return-day was the first Monday of December. It was duly entered, on motion of the plaintiff, on that day, on the general docket. The term of the Court for this county commenced on the same day.

The plaintiff moved, in Court, for leave to amend his writ, by inserting a direction therein, "To any constable of the city of Worcester;" by one of whom the writ had been served.

It was *held*, that after the action was entered on the general docket, the Court had jurisdiction thereof, and that it was pending in Court when subsequently in session, and that the Court had authority to grant the amendment. After hearing the parties, the motion was allowed. — *Thayer* v. *Harris*.

Action, when pending. This action was commenced subsequent to the first day of September, 1851. It was returnable on the first Monday of December, and was duly entered by the clerk on that day in the general docket. After the commencement of the action and before its entry, the female plaintiff died. No appearance has been entered for the defendant, and now James Brennan comes into Court and suggests the death of the female plaintiff, and moves that the further prosecution of the suit may be in his own name, and that the suggestion of the death of the female plaintiff may be ordered to be entered on the docket.

Held, the Court being in session in a term commencing on the day of the return-day of said writ, that the action was pending in Court, and that it was competent to allow the motion. And it was allowed, and the clerk directed to make the entries on the docket. — *Brennan and Wife* v. *Boyer*.

Complaint for non-entry of Writ. Complaint that Brown sued out his writ returnable into this Court on the first Monday of December as the return-day against Phelps, and inserted the name of complainant in the writ, as trustee of Phelps, and caused the writ to be duly served; and that Brown failed to enter his action. The complainant prays for a judgment for his costs.

Held, that the statute of 1851, ch. 233, having made provision relative to the consequences of the non-entry of an action, and the case of trustees not being included in such provision, there was no authority under the circumstances stated, to render a judgment for costs, and the complaint was dismissed. — *Ballou* v. *Brown*.

Action pending — Discontinuance as to one Defendant. The writ was returnable to this Court, and was duly entered on the return-day on the general docket. No service of the writ had been made on one of the defendants, and the other defendant entered no appearance. The plaintiff in Court moved for leave to discontinue against the defendant upon whom no service had been made, and to prosecute his writ against the other defendant. The motion was allowed, upon the ground that the action, upon entry upon the general docket, was pending in Court at a term thereof, commencing on the same day as the return-day of the writ: and the clerk was directed to make a note of the allowance of the motion on the docket. — *Stone* v. *Wright et al.*

Miscellaneous Intelligence.

The new Evidence Act in England. — The Act of 14 and 15 Vict. c. 99, to amend the Law of Evidence, went into operation the first of November last. The English journals speak of its results being already felt in changing the administration of justice. Under the second section of the Act, parties to an action, or those on whose behalf it is either brought or defended, are not only competent but compellable to give evidence for or against themselves. In frequent cases already parties have taken advantage of this provision, and some of the Superior Judges at Westminster have taken the course at the outset, to commit plaintiffs and defendants for perjury in their own cases. Baron Martin has committed two persons, and Mr. Justice Erle one. We give below the instructions of Mr. Recorder Stuart Wortley to the Grand Jury, in reference to the cases of committal for perjury which had been sent to the Central Criminal Court, and also the views of Baron Martin upon the subject, with the remarks of the Jurist thereon. Mr. Wortley says:

"These cases arise out of the new law, enabling the parties to causes to give evidence on oath in those causes, like other witnesses. This alteration of the law is believed by many, and he confessed he is one of them, to be a change which will be attended with a very good effect in the result; although, as might naturally be expected with regard to such a matter, it might in the outset be attended by some inconvenience. In the present instance, it would appear that two persons were examined as witnesses in actions to which they were parties; and the learned judges before whom they were examined, being of opinion that they had wilfully stated that which they knew to be false, committed them to take their trials for perjury. These committals have been urged by some persons as a proof of the inexpediency of the law: but with this point the Grand Jury had nothing whatever to do; all they had to consider was, whether a *primâ facie* case was established against the accused persons, and in that case their duty was to return true bills. In his opinion, those who consider these proceedings as a proof of the inexpediency of the law have come to an entirely false conclusion; because, although it is true that under the old system persons were not permitted to give evidence, and had no opportunity, consequently, to make false statements upon oath, yet it was too much the practice for persons to make defences and put false pleas in answer to claims that were made upon them, and they were thus equally guilty of the offence of perjury in the eye of God as though they had actually given false testimony. He believed that the effect of the new law will be to put an end altogether to false claims and false defences in Civil Courts." * * *

What follows is from the London Jurist, No. 775.

"On the occasion of a very recent trial, (*Porter* v. *Voes*, in the Exchequer,) one of the first under the new Evidence Act, Mr. Baron Martin is reported to have spoken to the following effect: — 'That which had occurred in this trial was what he very much feared would often arise — the plaintiff and defendant differed distinctly in their views, not only of the conditions of the agreement, but also as to what had passed upon payment of the account being demanded. Each party had given his own version of the terms of the agreement, and its operation. Those versions were inconsistent the one with the other With reference to the evidence of plaintiffs and defendants, it was the opinion of one of the most eminent members of the bench, that the evidence of such persons ought to be regarded by juries somewhat in the same light as though it were that of a man who, having been implicated in the commission of a crime, eventually turned round and became what was called 'Queen's evidence,' as against his former companions and associates; and, therefore, that juries ought not to place implicit reliance on the evidence of such parties, unless their statements were confirmed aud fully corroborated by other witnesses. In all criminal trials the evidence of an accomplice was looked upon with an eye of suspicion until it was confirmed by other witnesses, or by the peculiar circumstances of the particular case. So, in the case where a plaintiff or defendant gave his evidence, the eminent judge to whom he had referred was of opinion that those parties ought to be confirmed by other persons. Not that either plaintiff or defendant would intentionally say that which was not the fact, but because, having arrived at a certain view of the transaction, their minds, even though that view were erroneous, had become impressed with its truth; therefore it was that a confirmation by other witnesses became necessary."

"With great deference, we cannot but think that this is a most harsh view of the veracity of plaintiffs and defendants, and that there is no analogy whatever between the position of 'Queen's evidence,' and of the parties to an action giving evidence for themselves. A man who becomes Queen's evidence is confessedly a man who has associated himself with others in the commission of some crime, and who volunteers to betray his associates in order to procure his own escape. Such a man, therefore, steps into the witness-box with a double taint upon him — the taint of his crime, and the taint of his treachery; and it may well be recommended to a jury not to take his evidence except with suspicion. Moreover, he is giving evidence against persons who are not allowed to contradict him, so that he is comparatively safe from detection if he chooses to say that which is not true. But, in the case of the parties to an action, they must be taken to be (in the absence of any thing to show the contrary) men of average honesty and honor, and there is not on them, *primâ facie*, any taint. Why, then, should their evidence be likened to that of criminals? It is true they have an interest. But that is not the question; the question is, whether their characters are to be taken to be such as to make them loose as to speaking the truth for the sake of their interest; whether, in fact, it is to be assumed that each party will swear falsely for the sake of winning his cause. That the plaintiff and defendant should, in the case before Mr. Baron Martin, have given different versions of the contract between them, and that in numerous cases plaintiffs and defendants should contradict each other as to facts, is not in the least degree extraordinary; on the contrary, the thing must be so, for people never would come into the relative position of plaintiffs and defendants if they did not differ about something; and this difference is, of course, as often likely to be one of fact as of law. But in this they do not, as witnesses, differ from other witnesses, between whom there is continually conflict as to matters of fact.

"When plaintiffs and defendants do directly contradict each other, of

course a jury will either disregard altogether the evidence of both, or credit the one whose testimony is either corroborated by other testimony, or on the face of it most apparently true; and the jury will do so, not because they are parties, but because their evidence is, in fact, inconsistent. But if juries are told to suspect, as a matter of course, the veracity of a plaintiff or a defendant, without any ground for doing so, except that he is a party, they will, we conceive, be told, not only to defeat the very intention of the Legislature, but to do in the jury-box what men do not, in their transactions with the world, as men of business. We do not, as a matter of course, disbelieve every statement made to us in business by men, because such statement is to their advantage; we measure our belief by our knowledge of their characters, or by the greater or less probability of the truth of the statements made; and so, we apprehend, ought juries to deal with the evidence of plaintiffs and defendants. At any rate, if they do not — if their evidence is never to be relied on unless confirmed by other persons, the Legislature might as well never have passed the Evidence Act, the very end and aim of which is to enable a jury to elicit the truth by examining the parties, in cases where they are either the only parties who know any thing about the facts in dispute, or at least those who know most about them."

Domicil, Law of. — Mr. Webster, in answer to a resolution of the House of Representatives, asking for information respecting the trial, sentence &c., of John S. Thrasher, in the Island of Cuba, and his right to claim the protection of the Government, as a native-born citizen of the United States, gave the following exposition of the law of domicil. The answer was communicated to the House by the message of the President, on the 22d December last.

"The first general question, then, is as to his right to exemption from Spanish law and Spanish authority, on the ground of his being a native-born citizen of the United States.

"The general rule of the public law is, that every person of full age has a right to change his domicil; and it follows, that when he removes to another place with an intention to make that place his permanent residence, or his residence for an indefinite period, it becomes instantly his place of domicil; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence of citizenship at some future period. The Supreme Court of the United States has decided that a person who removes to 'a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside in that country, as to stamp him with its national character;' and this undoubtedly is in full accordance with the sentiments of the most eminent writers, as well as with those of high judicial tribunals on the subject. No Government has carried this general presumption further than that of the United States, since it is well known that hundreds of thousands of persons are now living in this country who have not been naturalized, according to the provisions of law, nor sworn any allegiance to this Government, nor been domiciled amongst us by any regular course of proceedings. What degree of alarm would it not give to this vastly numerous class of men, actually living amongst us as inhabitants of the United States, to learn that, by removing to this country, they had not transferred their allegiance from the Governments of which they were originally subjects to this Government? And, on the other hand, what would be the condition of this country and its Government, if the sovereigns of Europe, from whose dominions they have emigrated, were supposed to have still a right to interpose to protect such inhabitants against the penalties which might be justly incurred by them in conse-

quence of their violation of the laws of the United States? In questions on this subject, the chief point to be considered is the *animus manendi*, or intention of continued residence; and this must be decided by reasonable rules, and the general principles of evidence. If it sufficiently appear that the intention of removing was to make a permanent settlement, or a settlement for an indefinite time, the right of domicil is acquired by a residence even for a few days.

"It is undoubtedly true that an American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own Government; and if, without the violation of any municipal law, he should be treated unjustly, he would have a right to claim that protection; and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed, when, by his own act, he has made himself the subject of a foreign power. And a person found residing in a foreign country is presumed to be there *animo manendi*, or with the purpose of remaining; and to relieve himself of the character which this presumption fixes upon him, he must show that his residence was only temporary, and accompanied all the while with a fixed and definite intention of returning. If in that country he engages in trade and business, he is considered by the law of nations as a merchant of that country; nor is the presumption rebutted by the residence of his wife and family in the country from which he came. This is the doctrine as laid down by the United States Courts. And it has been decided that a Spanish merchant, who came to the United States and continued to reside here and carry on trade after the breaking out of war between Spain and Great Britain, is to be considered an American merchant, although the trade could be lawfully carried on by a Spanish subject only. But the necessity of any presumption in Mr. Thrasher's case is entirely removed, if in fact he actually took out letters of domiciliation, in order to enable him to transact business such as a Spanish subject, or a domiciliated freeman can alone transact, and actually swore allegiance to the Spanish crown.

"But independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any formal allegiance, it is well known that by the public law an alien, or a stranger-born, for so long a time as he continues within the dominions of a foreign Government, owes obedience to the laws of that Government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations; but this duty of obedience to the laws, arising from local and temporary allegiance, ceases the moment he transfers himself back to his original country.

"An American citizen, by birth, owing of course a native allegiance to the United States, going abroad and obtaining no residence under a foreign Government, and professing to such Government no allegiance, and who should yet commit acts of hostility or war against this country, would seem to bring himself within the act of Congress, which declares that if any person or persons owing allegiance to the United States of America shall levy war against them, or shall adhere to their enemies, giving them aid and comfort, within the United States or elsewhere, he or they shall be adjudged guilty of treason. And the reason is plain, since his allegiance in such a case is original and native, and has not been transferred, nor lost in any other local allegiance, arising from residence elsewhere, but continues to be the primitive tie which binds him to his country.

"But, as has been already said, every foreigner-born, residing in a country, owes to that country allegiance and obedience to its laws so long

as he remains in it, as a duty imposed upon him by the mere fact of his residence, and the temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized States, and nowhere a more established doctrine than in this country."

GRAND JURORS, DUTY OF — POWER OF TO COMPEL WITNESSES TO DISCLOSE CRIMES. — At the recent term of the Circuit Court of the United States for the Middle District of Tennessee, a witness before the Grand Jury having refused to answer certain questions, unless ordered so to do by the Court, His Honor Mr. Justice Catron further charged the Jury as follows: —

"The Grand Jury is bound to present on the information of one of its members. He states to his fellow-jurors the facts that have come to his knowledge by seeing or hearing them confessed by the guilty party. The juror makes his statement as a witness under his oath taken as a grand juror. He does state, and is bound by his oath to state, the person who did the criminal act, and all the facts that are evidence tending to prove that a crime had been committed.

"The Grand Jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses. And the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime. If a grand juror was the witness, he would be bound to give the information to his fellow-jurors voluntarily, as his oath requires him to do so. And so also the general oath taken in Court by a witness who comes before the Grand Jury imposes upon him the obligation to answer such legal questions as are propounded by the jury, to the end of ascertaining crimes and offences (and their perpetrators) that the jurors suppose have been committed. If general inquiries could not be made by the Grand Jury, neither the offence nor offender could be reached in many instances where common law jurisdiction is exercised. In the Federal Courts such instances rarely occur; still they have happened in this circuit in cases where gangs of counterfeiters were sought to be detected; but especially in cases where spirituous liquors had been introduced among the Indians residing west of the Missouri river. That drunkenness, riots, and occasionally murder had been committed by Indians who were intoxicated, was notorious; but who had introduced the intoxicating spirits into the Indian country was unknown. The fact of introduction was the crime punishable by act of Congress. In the Missouri district many such cases have arisen. There the Grand Jury is instructed as of course to ascertain who did the criminal act. The fact and the offender it is their duty to ascertain; and these they do ascertain constantly by general inquiries of witnesses whether they know that spirituous liquors have been introduced into the Indian country, and, secondly, who introduced them.

"It is part of the oath of the Grand Jury to inquire of matters given them in charge by the Court, and to present as criminal such acts as the Court charges them to be crimes or offences indictable by the laws of the United States. And in executing the charge it is lawful for the Grand Jury — and it is its duty — to search out the crime by questions to witnesses of a general character. The questions propounded by the jury in this instance, and presented to the Court for our opinion, are in substance: 'Please to state what you may know of any person or persons in the city of Nashville who have begun, or have set on foot, or who have provided the means for a military expedition from hence against the Island of Cuba? 2d. Or of any person who has subscribed any amount of money to fit out

such an expedition? 3d. Or do you know of any person who has procured any one to enlist as a soldier in a military expedition to be carried on from hence against the Island of Cuba? 4th. Or of any person asking subscriptions for, or enlisting as soldiers in a military expedition to be carried on from hence against the Island of Cuba?'

"As all these questions tend fairly and directly to establish some one of the offences made indictable by the act of 1818, and are pertinent to the charge delivered to the Grand Jury, they may be properly propounded to the witness under examination, and he is bound to answer any or all of them, unless the answer would tend to establish that the witness was himself guilty according to the act of Congress.

"This doctrine is believed to be in conformity to the former practice of the State Circuit Courts of Tennessee; and is assuredly so according to the practice in other States, as will be seen by the opinions of Supreme Courts and Circuit Judges, found in Wheaton's Criminal Law, ch. 6."

The Treason Trials in Pennsylvania. — The trial of Castner Hanaway, indicted for treason, for participating in the resistance to the United States officers, who were attempting to arrest alleged fugitive slaves, in the rescue of the slaves, and in the murder of their master, who was one of the pursuing party, in what are known as the Christiana riots, resulted in his acquittal, and in the abandonment of the remaining indictments, eight or nine in number, by the government. There was no question but that the overt acts charged in the indictments were committed. The point to be decided was, whether the acts, as proved, constituted the crime of treason, as charged in the indictment. Mr. Justice Grier instructed the jury that they did not come within the definition of treason, as laid down in the Constitution of the United States. We give below some extracts from his summing up to the jury, as published in the newspapers: —

"To constitute the crime of treason, there must be a conspiracy to resist by force, and an actual resistance, by force of arms or intimidation by numbers, to effect something of a public nature, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution or to compel its repeal.

"A band of smugglers may be said to set the laws at defiance, and to have conspired together for that purpose, and to resist, by armed force, the execution of the revenue laws; they may have battles with the officers of the revenue, in which numbers may be slain on both sides, and yet they would not be guilty of treason, because it is not an insurrection of a *public* nature, but merely for private lucre or advantage.

"A whole neighborhood of debtors may conspire together to resist the sheriff and his officers in executing process on their property; they may perpetrate their resistance by force of arms, may kill the officer and his assistants, and yet they will be liable only as felons, not as traitors. Their insurrection is of a private, not of a public nature; their object is to hinder or remedy a private, not a public grievance.

"A number of fugitive slaves may infest a neighborhood, and may be encouraged by the neighbors in combining to resist the capture of any of their number; they may resist, with force and arms, their master or the public officers who may come to arrest them; they may murder and rob them; they are guilty of felony, and liable to punishment, but not as traitors. Their insurrection is for a private object, and connected with no public purpose.

"It is true that, constructively, they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws and the anti-renters the execution laws. Their insurrection, their violence, however great their numbers may be, so long as it is

merely to attain some personal or private end of their own, cannot be called levying war. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is public and national, the other private and personal. Without desiring to invade the prerogatives of the jury in judging the facts of this case, the Court feel bound to say that they do not think the transaction with which the prisoner stands charged with being connected rises to the dignity of treason or a levying of war; not because the number or force was insufficient, but, first, for want of any proof of previous conspiracy to make *a general and public resistance to any law* of the United States.

"Secondly — There is no evidence that any person concerned in the transaction knew there were such acts of Congress as those which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed kidnappers, by which slang term they probably included not only actual kidnappers, but all masters and owners seeking to recapture their slaves, and the officers and agents assisting therein.

"The testimony of the prosecution shows that notice had been given, that certain fugitives were pursued; the riot, insurrection, tumult, or whatever you call it, was but a sudden '*conclamatio*' or running together, to prevent the capture of certain of their friends or companions, or to rescue them if arrested. Previous to this transaction, as we are informed, no attempt had been made to arrest fugitives in the neighborhood under the new act of Congress by a public officer. Heretofore arrests had been made not by the owner in person, or his agent properly authorized, or by an officer of the law.

"Individuals, without any authority, but incited by cupidity and the hope of obtaining the reward offered for the return of a fugitive, had heretofore undertaken to seize them by force and violence, to invade the sanctity of private dwellings at night, and insult the feelings and prejudices of the people. It is not to be wondered at, that a people subject to such inroads should consider odious the perpetrators of such deeds, and denominate them kidnappers; and that the subjects of this treatment should have been encouraged in resisting such aggressions, where the rightful claimant could not be distinguished from the odious kidnapper, or the fact be ascertained whether the person seized, deported, or stolen in this manner was a free man or a slave.

"But the existence of such feelings is no evidence of a determination or conspiracy by the people to publicly resist any legislation of Congress, or levy war against the United States. That in consequence of such excitement such an outrage should have been committed is deeply to be deplored. That the persons engaged in it are guilty of aggravated riot and murder cannot be denied. The assault and murder were wantonly committed, after all attempts to execute the process had been abandoned.

"This insult upon the laws of the country deserves, and I presume will receive, condign punishment on the persons who shall be proved to be the guilty participators in it. But riot and murder are offences against the State Government. It would be a dangerous precedent for the Court and jury, in this case, to extend the crime of treason by construction to doubtful cases.

"The time may come when an elective judiciary, dependent on the will of the majority, (which is here the sovereign power,) may use such a precedent to justify the foulest oppression and injustice, and the tragedies enacted by a Scroggs and a Jeffreys be repeated, and again sully the page of history."

THE LAW OF DIVORCE IN CALIFORNIA. — The criminal law enforced at San Francisco has been the subject of some astonishment in more civilized

communities, and the following report of a divorce trial before the District Court, at Coloma, will be read with no less surprise.

"'The wife was the complainant, and her counsel attempted to prove that an agreement to separate had been entered into by the parties on coming across the plains; but was afterward refused to be carried out by the defendant. Cruelty was attempted to be established by the plaintiff's fetching wood and water, and doing other unfeminine duties, such as cooking, etc., both on coming across the plains and after she arrived in California. The only hard language the husband was heard to use toward his wife was once calling her a liar. The husband proved disobedience to his wishes in her attending at balls and mixing with society that did not meet his approbation; also that the unfeminine duties complained of were voluntarily performed by the lady and not at the husband's command, he being all the time industriously employed. The above is in substance all that was sworn to in Court on either side. Judge Farwell's charge to the jury was in substance as follows: 'Marriage is a civil contract, and subject to all the conditions of other civil contracts; and can be entered into and broken at the pleasure of the parties themselves. If the jury are of opinion that an engagement was entered into on the plains to separate, and the defendant afterward refused to do so, they must find for the plaintiff.'"

The Telegraph Case. — In the Circuit Court at Philadelphia, in the case of *French et al.* of the Morse line of telegraph, and *Rogers et al.* of the Bain line, we see it stated that the Court decided all the questions in controversy in favor of the claimants under Professor Morse's patents, and declares the process and apparatus used on the Bain line for telegraphing and recording signs at a distance infringements of Morse's patents. The points ruled by the Court in this case are: —

"1. That an art is the subject of a patent, as well as an implement or machine. 2. That an inventor may surrender and obtain a re-issue of his patent more than once if necessary. 3. That Professor Morse was the first inventor of the art of recording signs at a distance by means of electro-magnetism, or the magnetic telegraph. 4. That the several parts or elements of the Morse Telegraph are covered and protected by his patent, as new inventions, and are really new, either as single, independent inventions, or as parts of a new combination for the purpose specified. 5. That the patent granted to Professor Morse for his 'Local Circuit' is valid, and that the 'Branch Circuit' of the Bain line is an infringement of it. 6. That the subject and principles of the chemical telegraph are clearly embraced in Morse's patents."

Baron Platt. — At the recent Assizes at Liverpool, a stabbing case from Manchester was heard before Baron Platt, who, in summing up to the jury, used these words: —"One of the witnesses tells you that he said to the prisoner, 'If you use your knife, you are a damned coward.' "I say, also," continued the learned judge, apparently in deep thought, "that he was a damned coward, and any man is a damned coward who will use a knife." — *Law Magazine.*

Professional Courtesies. — The Batavia Times says that at a late circuit, in Genesee county, N. Y., when one of the lawyers appealed to the Court, for the relaxation of some rule which the opposite counsel ought to grant, by way of courtesy, Justice Mullet bluntly remarked — "Your courtesies, gentlemen, you must arrange among yourselves; I do not intend to sit here *and act as master of ceremonies.*"

Runaway Apprentices sent back to Masters under the Fugitive Slave Law. — A file maker in the State of New York, by the name of Russell, who has a large number of indentured apprentices, has been greatly troubled by having his apprentices enticed away, or by their

running away, into other States. He has made use of the provisions of the Fugitive Slave Act, so called, of September 28, 1850, to reclaim five or six of these fugitives from labor; both in Connecticut, before Commissioner Ingersoll, of New Haven, and in Massachusetts, before Commissioner Loring, of Boston. We are not informed whether the apprentices had any counsel to defend them in New Haven; they had in Boston.

THE DINNER OF THE NEW YORK BAR TO KOSSUTH. — We refer to the dinner of the New York Bar to Kossuth, simply to chronicle the fact that it took place, and to express our surprise that in our country, and especially in New York, liberty of speech should have been denied to a most distinguished jurist and judge, in answering to a sentiment to which, as is reported, he was expected to respond. There may possibly be some justifying explanation, but we do not see, in the reported speech of Judge Duer, any thing disrespectful or uncourteous to their distinguished guest, nor do we suppose that *the whole* bar of New York are in favor of intervention according to Kossuth.

Obituary Notice.

IN Auburn, New York, November 10th, HON. ELIJAH MILLER. The Auburn Daily Advertiser, of November 12th, gives the following obituary:—

"Under the appropriate head, we announce the death of this distinguished and much esteemed citizen of Auburn. Though this is an event not wholly unexpected to those most intimate with him, and to none who have observed his daily failing health and strength for the past few weeks, yet the death of one whose name has been so long associated with the growth and prosperity of our city, and who has occupied so prominent a position in our midst, has, as it was well calculated to do, filled the minds of all who knew him, with feelings of painful regret.

"Judge Miller was almost one of the pioneers of Cayuga county, having removed here and settled at Aurora, in 1795, from Bedford, Westchester county, before any such place as Auburn was known. He was the son of Samuel Miller, of that place, a patriot of the Revolution. Judge Miller was a man remarkable for his strength of mind and vigorous intellect, and for a modesty that amounted almost to diffidence, and which prevented him from ever attempting to speak in Court, though universally admitted to be one of the most profound lawyers in the State. He studied his profession with the late Walter Wood, Esq., and commenced the practice of the law in Seneca county.

"After some years spent in the practice of his profession, in that county, and at Geneva, he removed to Auburn, where he has ever since resided. During the administration of De Witt Clinton, he held the office of county clerk, and was subsequently appointed to the office of the First Judge of the Court of Common Pleas, which he held for several years, and in discharge of the duties of which, he acquired a high reputation for his profound legal acquirements, his manly firmness and independence of character, for his inflexible integrity, and his rigid adherence to justice and right. He retired from the profession about twenty years ago.

"Judge Miller married in early life, but soon after lost his wife, leaving two children, both daughters. One of them subsequently became the wife of Hon. Alvah Worden, of Canandaigua, and the other of Hon. William H. Seward.

"There are but very few men who retained all the faculties of his mind, in so remarkable a degree, and so perfectly unimpaired, in almost every respect, as Judge Miller. Though he had reached the good old age of fourscore years, his memory was as good, his mind as vigorous and active, almost to the hour of his death, as in the prime of manhood. He possessed many noble traits of character, traits that endeared him to his friends, and made him some enemies.

"No man possessed a kinder heart, or would go farther to assist those who had inspired his confidence. He revered truth, and frankness, and honesty in others, and gave, in his life, a striking illustration of those virtues. He deeply sympathized with the afflicted, and down-trodden and oppressed of every nation and color, stern as his nature seemed to those who did not know his heart; and he gave practical evidence of the sincerity of his profession. To Auburn, his death will be a real loss. But it is only to his family and to his intimate friends, that it will be felt with all the force of an irreparable loss."

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Bailey, Christopher S.	Chester,	Oct. 11,	A. W. Stockwell.
Barbour, Frederic A.	Springfield,	" 14,	A. W. Stockwell.
Beal, Benjamin, 3d.	Abington,	Nov. 24,	Welcome Young.
Brown, W. H. *et al.*	Cambridge,	" 26,	Asa F. Lawrence.
Bugbee, Charles A.	Springfield,	Oct. 14,	A. W Stockwell.
Chapin, C. & J.	Holyoke,	Nov. 20,	A. W. Stockwell.
Chapin, Stephen	Holyoke,	" 20,	A. W. Stockwell.
Chapin, Stephen, Jr.	Holyoke,	" 20,	A. W. Stockwell.
Coburn, Reuben S.	Tyngsboro',	" 1,	Bradford Russell.
Coomes, Edmund, *et al.*	Springfield,	" 29,	A. W. Stockwell.
Dadman, Nathan	Ashland,	" 3,	Bradford Russell.
Dexter, Aaron, *et al.*	Roxbury,	" 8,	John M. Williams.
Draper, Joseph D *et al.*	Boston,	" 26,	John M. Williams.
Dresser, Thomas N.	Haverhill,	" 10,	John G. King
Edgerly, Samuel, *et al.*	Roxbury,	" 8,	John M. Williams.
Elmendorff, James L.	Sheffield,	" 20,	J. E. Field.
Emery, William E.	Lowell,	" 9,	S. P. Adams.
Fisk, Benjamin W.	Springfield,	" 17,	A. W. Stockwell.
Fitch, Justus	Westfield,	" 18,	A. W. Stockwell.
Gallaudet & Co.	Holyoke,	Oct. 29,	A. W. Stockwell.
Gannett, Thomas C.	Sharon,	Nov. 26,	Francis Hilliard.
Gardner, G. J. *et al.*	Cambridge,	" 26,	Asa F. Lawrence.
Gates, Edwin	Leominster,	" 24,	Charles Mason.
Gay, Silvius H.	Hopkinton,	" 12,	Asa F. Lawrence.
Gleason, George H.	Lowell,	" 22,	S. P. Adams.
Hodgdon, George C.	Salem,	" 6,	John G. King.
Huston, Arthur	Boston,	" 14,	Frederic H. Allen.
Larkin, Thomas R. *et al.*	Lowell,	" 7,	Daniel Saunders, Jr.
Lesure, Swan L.	Lowell,	" 28,	S. P. Adams.
Lincoln, Cortes H.	Dedham,	" 13,	Francis Hilliard.
Lowrey, Frederic N.	Lee,	" 29,	J. E. Field.
Macy, Robert B.	Boston,	" 29,	Frederic H. Allen.
Macy, Rowland H.		" 29,	John G. King.
Mansfield, Warren	Braintree,	" 1,	Francis Hilliard.
Maynard, George C.	Hardwick,	" 29,	Charles Brimblecom.
McGinley, John	Taunton,	" 14,	E. P. Hathaway.
Nash, Daniel C.	Stoughton,	" 3,	Francis Hilliard.
Newton, Antipas	Roxbury,	" 10,	Francis Hilliard.
Nims, Silas	Westminster,	" 21,	Charles Mason.
Norris, Samuel	Malden,	" 8,	Bradford Russell.
Noyes, Joshua, *et al.*	Georgetown,	" 7,	Daniel Saunders, Jr.
Nutting, Eleazer	Pepperell,	" 28,	Bradford Russell.
O'Keefe, Thomas F.	Boston,	" 26,	Frederic H. Allen.
Packard, Edward S.	North Bridgewater,	" 1,	Welcome Young.
Partridge, Lewis H.	Newton,	" 6,	Asa F. Lawrence.
Pierce, Peter	Templeton,	" 26,	Charles Mason.
Pitts, James	Lancaster,	" 25,	Charles Mason.
Porter, Isaac	Braintree,	" 19,	Francis Hilliard
Pratt, Julius A.	Springfield,	Oct. 22,	A. W. Stockwell.
Pratt, Pliny	Springfield,	Nov. 15,	A. W. Stockwell.
Putnam, Amos H.	Springfield,	" 14,	A. W. Stockwell.
Rhodes, Alfred J.	Stoneham,	" 26,	Bradford Russell.
Richardson, Christopher C.	Cambridge,	" 18,	Asa F. Lawrence
Seidenburg, Henry	Newburyport,	" 7,	John G. King.
Shepard, Calvin	Ashland,	" 4,	S. P. Adams.
Shoules, Lewis F.	Palmer,	Oct. 14,	A. W. Stockwell.
Simonds, George	Boston,	Nov. 12,	John M. Williams.
Skinner, James, *et al.*	Roxbury,	" 8,	John M. Williams.
Smith, Daniel T. *et al.*	Boston,	" 26,	John M. Williams.
Springer, John S. *et al.*	Boston,	" 17,	John M. Williams.
Springer, William A *et al.*	Boston,	" 17,	John M. Williams.
Stearns, Charles	Springfield,	" 15,	A. W. Stockwell.
Stebbins, Milton	Wilbraham,	" 3,	A. W. Stockwell.
Stone, Daniel	Needham,	" 15,	Francis Hilliard.
Strong, Wolcott H.	Chester,	" 8,	A. W. Stockwell.
Tilt, Benjamin B. *et al.*	New York,	" 8,	John M. Williams.
Tyon, Nelson	Springfield,	Oct. 7,	A. W. Stockwell.
Upton, Benjamin, *et al.*	Salem,	Nov. 8,	John G. King.
Upton, Benjamin, Jr.	Salem,	" 8,	John G. King.
Upton, Henry P.	Salem,	" 8,	John G. King.
Very, Augustus, *et al.*	Danvers,	" 22,	John G. King.
Very, Lewis	Danvers,	" 22,	John G. King.
Voelckers, Theodore	Boston,	" 12,	John M. Williams.
Wetherell, Joseph A.	Attleborough,	" 8,	E. P. Hathaway.